

**THE PEN AND THE SWORD: THE PEOPLE'S REPUBLIC OF  
CHINA'S EFFORT TO REDEFINE THE EXCLUSIVE  
ECONOMIC ZONE THROUGH MARITIME LAWFARE AND  
MILITARY ENFORCEMENT**

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*"But more wonderful than the lore of old men and the  
lore of books is the secret lore of ocean."*<sup>1</sup>

I. Introduction

Lieutenant Shane Osborn, USN, thought he was about to die.<sup>2</sup> At the controls of a U.S. Navy EP-3 Aries,<sup>3</sup> Osborn and his co-pilot, Lieutenant

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<sup>1</sup> H. P. LOVECRAFT, H.P. LOVECRAFT: THE COMPLETE FICTION 60 (2011).

<sup>2</sup> *Reliving the U.S. Spy Plane Crisis*, MILITARY.COM, [http://www.military.com/Content/MoreContent?file=FL\\_pilotep3\\_041701](http://www.military.com/Content/MoreContent?file=FL_pilotep3_041701) (last visited Sept. 9, 2013).

<sup>3</sup> *United States Navy Fact File*, NAVY.MIL, [http://www.navy.mil/navydata/fact\\_display.asp?cid=1100 tid=1000&ct=1](http://www.navy.mil/navydata/fact_display.asp?cid=1100 tid=1000&ct=1) (last visited Sept. 9, 2013).

Four-engine turboprop signals intelligence (SIGINT) reconnaissance aircraft. The EP-3E ARIES II (Airborne Reconnaissance Integrated Electronic System II) is the Navy's only land-based signals intelligence (SIGINT) reconnaissance aircraft. The 11 aircraft in the Navy's inventory are based on the Orion P-3 airframe and provide fleet and theater commanders worldwide with near real-time tactical SIGINT. With sensitive receivers and high-gain dish antennas, the EP-3E exploits a wide range of electronic emissions from deep within targeted territory. During the 1990s twelve P-3Cs were converted to EP3-E ARIES II to replace older versions of the aircraft. The original ARIES I aircraft were converted in the late 1960s and early 1970s. The last EP-3E ARIES II aircraft was delivered in 1997. EP-

Junior Grade Jeffery Vignery, fought desperately to regain control of their severely damaged aircraft as it plunged toward the Pacific Ocean.<sup>4</sup> In the midst of a brutal 8,000 foot inverted dive, Osborn instructed the rest of the twenty-four member crew to prepare to bailout.<sup>5</sup> While Vignery sent out repeated distress calls, Osborn realized that were he able to steady the plane enough so that the crew could bailout, it would not be possible for him to leave the controls unmanned long enough to escape himself.<sup>6</sup> A routine reconnaissance mission had just turned into a death sentence.

Osborn and his crew took off from Kadena Air Base, Okinawa, just before dawn on April 1, 2001.<sup>7</sup> Their assigned mission was to fly a “reconnaissance track in international air space south of China’s Hainan Island and north of the Philippines.”<sup>8</sup> It was a standard mission that had been performed in one form or another by the U.S. Navy for several years.<sup>9</sup> Included within this routine was the expectation that a pair of Chinese J-8 Finback military jets would intercept the EP-3 upon its acquisition by Chinese radar.<sup>10</sup> This, too, was common practice.<sup>11</sup> These intercepts, however, had become increasingly aggressive since December 2000.<sup>12</sup> In fact, just one week earlier, Chinese fighter jets approached Osborn’s aircraft in what he called a harassing manner.<sup>13</sup>

As the nine-hour mission wore on, it appeared that this flight might prove to be the exception. The crew had seen no sign of Chinese military aircraft upon entering the airspace over the South China Sea. Likewise, no sign of Chinese military aircraft appeared on radar during

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3Es have been heavily engaged in reconnaissance in support of NATO forces in Bosnia, joint forces in Korea and in Operation Southern Watch, Northern Watch, and Allied Force.

<sup>4</sup> *Lt. Shane Osborn: Looking at a Miracle*, 20 HISTORY.NAVY.MIL, <http://www.history.navy.mil/nan/backissues/2000s/2003/so03/osborn.pdf> (last visited Jan. 30, 2012).

<sup>5</sup> *Reliving the U.S. Spy Plane Crisis*, *supra* note 2.

<sup>6</sup> *Id.*

<sup>7</sup> SHANE OSBORN, *BORN TO FLY: THE UNTOLD STORY OF THE DOWNED AMERICAN RECONNAISSANCE PLANE*, at v (2001).

<sup>8</sup> *Id.* at 8.

<sup>9</sup> *Id.*

<sup>10</sup> *Lt. Shane Osborn: Looking at a Miracle*, *supra* note 4.

<sup>11</sup> OSBORN *supra* note 7, at 8.

<sup>12</sup> *Rumsfeld Complains of Harassment by Chinese Pilot*, ABCNEWS.GO.COM, [http://abcnews.go.com/International/story?id=81231&page=1#.Txm-LXLQc\\_N](http://abcnews.go.com/International/story?id=81231&page=1#.Txm-LXLQc_N) (last visited Sept. 26, 2013).

<sup>13</sup> OSBORN *supra* note 7, at 80.

the majority of their electronic surveillance mission.<sup>14</sup> Just ten minutes before finishing their final sweep and beginning the return trip to Kadena, the Chinese jets appeared.<sup>15</sup> A pair of J-8 Finbacks approached the EP-3, which was flying at an altitude of 22,500 feet at approximately 180 knots.<sup>16</sup> At first seemingly content to trail at a safe distance, the Finbacks soon changed tactics and closed, at times, to within 10 feet of Osborn's aircraft.<sup>17</sup> Such close proximity between aircraft is always exceedingly dangerous, but in this case the difference in aircraft capability increased the risk of collision exponentially. The Finback is a fighter jet designed to operate at speeds far greater than the EP-3's 180 knots.<sup>18</sup> In order for it to parallel the EP-3, the Finback had to slow down immensely, thus severely reducing its maneuverability.<sup>19</sup>

The Finback pulled up just under Osborn's left wing.<sup>20</sup> In an effort to slow down further, the Chinese pilot, Wang Wei, pulled the nose of his aircraft up slightly.<sup>21</sup> He fatally miscalculated the distance between the two aircraft. The main body of the fighter collided with the EP-3's number one rotary engine.<sup>22</sup> The EP-3's propellers cut through the fuselage of the Chinese jet, severing it in half.<sup>23</sup> The jet's higher, incoming velocity caused its forward section to spin up and across the nose of the EP-3.<sup>24</sup> The impact sheared the EP-3's nose cone clean off.<sup>25</sup> The remaining half of the fighter skipped across and underneath the EP-3 toward its right wing, barely avoiding both engines.<sup>26</sup> The collision instantly forced Osborn's aircraft into an inverted dive toward the Pacific Ocean.<sup>27</sup>

Through a sterling display of piloting excellence, Osborn and Vignery managed to pull the critically damaged aircraft out of its dive.<sup>28</sup>

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<sup>14</sup> *Lt. Shane Osborn: Looking at a Miracle*, *supra* note 4.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Reliving the U.S. Spy Plane Crisis*, *supra* note 2.

<sup>19</sup> *Id.*

<sup>20</sup> *Lt. Shane Osborn: Looking at a Miracle*, *supra* note 4.

<sup>21</sup> *Rumsfeld Complains of Harassment by Chinese Pilot*, *supra* note 12.

<sup>22</sup> OSBORN *supra* note 7, at 112.

<sup>23</sup> *Lt. Shane Osborn: Looking at a Miracle*, *supra* note 4.

<sup>24</sup> *Id.*

<sup>25</sup> OSBORN *supra* note 7, at 117.

<sup>26</sup> *Lt. Shane Osborn: Looking at a Miracle*, *supra* note 4.

<sup>27</sup> *Id.*

<sup>28</sup> OSBORN *supra* note 7, at 116–22.

Knowing that it would be impossible to keep the EP-3 in the air long enough to reach Kadena, Osborn evaluated his unenviable options.<sup>29</sup> He could either attempt to ditch the aircraft in the water or request an emergency landing on the Chinese island of Hainan.<sup>30</sup> Despite repeatedly requesting permission to land via the radio and failing to receive a response, Osborn chose to attempt an emergency landing on Hainan.<sup>31</sup> He succeeded and saved the life of every member of his crew.<sup>32</sup>

The collision and resulting emergency landing proved to be an intelligence coup for China. The EP-3 Aries is designed for electronic surveillance.<sup>33</sup> As such, it contained equipment and technology considered highly sensitive by the U.S. Government; thus, the United States strongly demanded that the aircraft was to be considered sovereign territory.<sup>34</sup>

Various accusations and justifications for the events leading up to the incident flowed back and forth across the Pacific.<sup>35</sup> The Chinese government argued, at various times, that the EP-3 was flying in Chinese airspace.<sup>36</sup> The United States adamantly disputed China's claim, as it stated that its aircraft was performing lawful operations well within international airspace boundaries when the Chinese Finback veered into it.<sup>37</sup> Also, while not explicitly stating so at the time, China disputes the

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<sup>29</sup> *Frontline Interview with Lt. Shane Osborn*, PBS.ORG, <http://www.pbs.org/wgbh/pages/frontline/shows/china/interviews/osborn.html> (last visited Sept. 26, 2013).

<sup>30</sup> *U.S. Spy Plane, Chinese Fighter Collide*, CNN.COM, [http://articles.cnn.com/2001-04-01/us/us.china.plane.02\\_1\\_spy-plane-chinese-fighter-chinese-island?\\_s=PM:US](http://articles.cnn.com/2001-04-01/us/us.china.plane.02_1_spy-plane-chinese-fighter-chinese-island?_s=PM:US) (last visited Sept. 26, 2013).

<sup>31</sup> OSBORN *supra* note 7, at 122.

<sup>32</sup> *U.S. Spy Plane, Chinese Fighter Collide*, *supra* note 30. While the U.S. aircrew did not suffer any fatalities, the Chinese fighter pilot, Wang Wei, lost his life when his jet crashed into the ocean.; *See also Jiang Gives Missing Pilot New Honor*, CNN.COM, [http://articles.cnn.com/2001-04-17/world/china.pilot\\_1\\_new-honor-grant-honors-wang-wei?\\_s=PM:asiapcf](http://articles.cnn.com/2001-04-17/world/china.pilot_1_new-honor-grant-honors-wang-wei?_s=PM:asiapcf) (last visited Feb. 3, 2012) (China's Prime Minister conferred upon Wang Wei the honorific, Guardian of the Sea and Sky. "The [Chinese] Navy has already made 33-year-old Wang, a 'revolutionary martyr', an honor designated for communist party members, soldiers and police officers killed in the line of duty.'").

<sup>33</sup> *United States Navy Fact File*, NAVY.MIL, [http://www.navy.mil/navydata/fact\\_display.asp?cid=1100&tid=1000&ct=1](http://www.navy.mil/navydata/fact_display.asp?cid=1100&tid=1000&ct=1) (last visited Sept. 26, 2013).

<sup>34</sup> *U.S. Chides China for Holding Spy Plane Crew*, CNN.COM, <http://archives.cnn.com/2001/WORLD/asiapcf/east/04/02/china.aircollision.03/> (last visited Nov. 26, 2011).

<sup>35</sup> *Who Caused the Crash?*, BBC.CO.UK, <http://news.bbc.co.uk/2/hi/asia-pacific/1260290.stm> (last visited Sept. 26, 2013).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

United States' contention that operations such as the EP-3's surveillance mission are lawful under the United Nations Convention on the Law of the Sea (UNCLOS).<sup>38</sup>

Despite appearances, however, the true origin of this dispute lies not in an argument over sovereignty of airspace, international or domestic, or even the operations allowed within each, but in one of sovereign rights over water, specifically the South China Sea. The harassment of the EP-3 signaled a marked escalation by China in its attempt to limit foreign maritime (and aviation) traffic within the South China Sea beyond established international legal norms.<sup>39</sup>

For the past half-century, the South China Sea has served as a source of territorial and maritime sovereignty controversy for several nations.<sup>40</sup> Differing national interpretations of island ownership and attendant maritime regimes lie at the heart of the issue.<sup>41</sup> Foremost among these positions is that taken by the People's Republic of China as it asserts full territorial sovereignty over all islands, reefs, atolls, and shoals<sup>42</sup> within an area known as the "nine-dotted line."<sup>43</sup> Most controversial, however, is China's claim to sovereignty over the ocean waters within this area as being a part of its "historic waters."<sup>44</sup> Effectively creating an expansive Exclusive Economic Zone (EEZ), China asserts that its claim to these waters entitles it to a greater ability to restrict certain types of foreign vessel activity than otherwise allowed under customary international law (CIL) and UNCLOS to which it is a signatory.<sup>45</sup> This position is

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<sup>38</sup> Yu Zhirong, *Jurisprudential Analysis of the U.S. Navy's Military Surveys in the Exclusive Economic Zones of Coastal Countries*, in *Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons*, 7 NAVAL WAR C. MAR. STUD. INST. 37, 43 (Naval War College Press, 2010).

<sup>39</sup> *U.S. Chides China for Holding Spy Plane Crew*, *supra* note 34.

<sup>40</sup> Li Jinming & Li Dexia, *The Dotted Line on the Chinese Map of the South China Sea: A Note*, 34 OCEAN DEV & INT'L L. 287, 287-95 (2003).

<sup>41</sup> Robert Smith, *Maritime Delimitation in the South China Sea: Potentiality and Challenges*, 41 OCEAN DEV & INT'L L. 214, 214-36 (2010).

<sup>42</sup> For purposes of clarity and brevity, the term "island" shall encompass islands, reefs, atolls, and shoals unless otherwise specified.

<sup>43</sup> Hasjim Djalal, *Conflicting Territorial and Jurisdictional Claims in South China Sea*, 7 THE INDON. Q., 49, 52 (1979). For the purpose of clarity, the term "U-shaped line" will be used instead of "nine-dotted line" or "eleven-dotted line" unless required for historical accuracy.

<sup>44</sup> Zou Keyuan, *Historic Rights in International Law and in China's Practice*, 32 OCEAN DEV & INT'L L., 149, 149-68 (2001).

<sup>45</sup> *Chronological Lists of Ratifications of Accessions and Successions to the Convention and the Related Agreements as of 03 June 2011*, UN.ORG, <http://www.un.org/depts/los/>

contentious and has led to brief armed conflicts with neighboring nations as the South China Sea,<sup>46</sup> in addition to its high strategic value, is believed to have enormous economic resources in the form of oil and natural gas.<sup>47</sup>

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reference\_files/chronological\_lists\_of\_ratifications.htm (last visited Sept. 26, 2013). China ratified the Convention on June 7, 1996. It was the ninety-second State to do so. Although it considers UNCLOS to be binding customary international law, the United States has not ratified the treaty.

<sup>46</sup> MYRON H. NORDQUIST, & JOHN NORTON MOORE, SECURITY FLASHPOINTS: OIL, ISLANDS, SEA ACCESS AND MILITARY CONFRONTATION 141–42 (1998). Vietnam occupied various islands within the Paracel chain from the 1950s to 1974 when a naval battle with China ended their physical presence on the islands. *See also China and Vietnam: Clashing Over an Island Archipelago*, TIME.COM, <http://www.time.com/time/world/article/0,8599,1953039,00.html> (last visited Sept. 26, 2013). In 1988, a brief naval battle between Vietnam and China resulted in the deaths of seventy Vietnamese sailors.

<sup>47</sup> *South China Sea Energy Data, Statistics, and Analysis*, EIA.GOV, [http://www.eia.gov/cabs/South\\_China\\_Sea/Full.html](http://www.eia.gov/cabs/South_China_Sea/Full.html) (last visited Sept. 26, 2013). Per the U.S. Energy Information Administration, “[t]he focus of most attention regarding the South China Sea’s (SCS) resources has been on hydrocarbons, especially oil. Oil reserve estimates for the entire SCS region vary. One Chinese estimate suggests potential oil resources as high as 213 billion barrels of oil (bbl). A 1993/1994 estimate by the U.S. Geological Survey estimated the sum total of discovered reserves and undiscovered resources in the offshore basins of the SCS at 28 billion bbl. The fact that surrounding areas are rich in oil deposits has led to speculation that the Spratly Islands could be an untapped oil-bearing province. There is little evidence outside of Chinese claims to support the view that the region contains substantial oil resources. One of the more moderate Chinese estimates suggested that potential oil resources (not proved reserves) of the Spratly and Paracel Islands could be as high as 105 billion bbl. Due to the lack of exploratory drilling, there are no proven oil reserve estimates for the Spratly or Paracel Islands.” Furthermore,

[n]atural gas might be the most abundant hydrocarbon resource in the SCS. Most of the hydrocarbon fields explored in the SCS regions of Brunei, Indonesia, Malaysia, Thailand, Vietnam, and the Philippines contain natural gas, not oil. Estimates by the U.S. Geological Survey and others indicate that about 60 to 70 percent of the region’s hydrocarbon resources are natural gas. As with oil, estimates of the SCS’ natural gas resources vary widely. One Chinese estimate for the entire SCS estimates natural gas reserves to be 2 quadrillion cubic feet. Another Chinese report estimates 225 billion barrels of oil equivalent in the Spratly Islands alone. If 70 percent of these hydrocarbons are gas as some studies suggest, total gas resources (as opposed to proved reserves) would be almost 900 trillion cubic feet (Tcf). In April 2006, Husky Energy working with the Chinese National Offshore Oil Corporation announced a find of proven natural gas reserves of nearly 4 to 6 Tcf near the Spratly Islands.

*Id.*

This article discusses China's dual-pronged strategy to limit foreign vessel operations within the South China Sea and its efficacy. This strategy may be divided into two general, but overlapping, categories: the use of maritime lawfare and the use of military enforcement.<sup>48</sup> This article clarifies each Chinese position before addressing their respective legal validity. First, it begins with an exploration of the concept of the EEZ and its development within international law. A brief recitation of competing State claims to EEZs within the South China Sea follows. Second, this article examines China's maritime lawfare effort in support of its claim of historic rights over the South China Sea islands and surrounding waters. It discusses China's strategy to use various aspects of CIL, UNCLOS, and domestic legislation. Third, this article examines China's well-coordinated and consistent military enforcement effort to physically limit foreign vessel operations within the South China Sea to support China's historic rights claim. And fourth, despite any structural flaws in the foundation upon which China is building its legal argument, this article argues that China's strategy of redefining the limits of foreign maritime activities within its contested EEZ in the South China Sea is slowly proving effective.<sup>49</sup>

## II. The Exclusive Economic Zone

Apprehension over China's attempt to deviate from internationally accepted norms regarding the EEZ concept are not the isolated overreactions of the scholarly elite of the international legal community. Such deviation has profound consequences for not only local commerce, security, and general oceanic navigation, but global as well. It was concern for consequences similar to these that fostered the creation, development, refinement, and the formal acceptance by the majority of States of modern navigational regimes. Understanding the need for and subsequent development of these regimes, such as the identification and corollary claims of territorial sovereignty by a State within an EEZ, is essential to understanding the gravity of China's effort.

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<sup>48</sup> Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFF. 146, 146 (2008) (“[A] strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”).

<sup>49</sup> China claims sovereignty and jurisdiction over nearly the entirety of the South China Sea. This position is actively disputed by Brunei, Malaysia, the Philippines, Taiwan, and Vietnam.

### A. Inception of the EEZ Concept

Concerted efforts by governmental powers to assert formal control over bodies of water, whether coastal or deep sea, stretch back through much of recorded history. Efforts to control dry land extend even further. Even States not considered to be “traditional maritime powers . . . have an interest in unimpeded access to the seas.”<sup>50</sup> Accompanying this interest is a desire to preserve this unimpeded access. The desire for preservation may stem from any number of national factors including physical security concerns and commercial or economic needs.

Of course, with the reality that not all great land powers are great sea powers comes an imbalance. “A land power may try to match a maritime power, or it can choose to respond much more cheaply, albeit perhaps less effectively, by attempting to deny its opponents maritime access near its shores.”<sup>51</sup> The strategic value in controlling maritime access near a State’s coastal areas cannot be overstated. Such strategic value requires a framework of international rules lest disputes, which would be common, devolve into destabilizing armed conflict.<sup>52</sup>

While UNCLOS formally established globally accepted jurisdictional boundaries governing navigation and economic interests at sea, it was not the first international attempt at doing so. Prior to the formation of the United Nations, The Hague Codification Conference of 1930 laid the ground work for formally defined maritime zones by recognizing an area of coastal water as a “universal sovereign territorial sea.”<sup>53</sup> This area would extend three miles seaward from the low-water (or low tide) mark of a State’s coast.<sup>54</sup>

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<sup>50</sup> JAMES KRASKA, *MARITIME POWER AND THE LAW OF THE SEA* 95 (2011). *See also A Cooperative Strategy for 21st Century Seapower*, NAVY.MIL, <http://www.navy.mil/maritime/Maritimestrategy.pdf> (stating that “[t]he oceans connect the nations of the world, even those countries that are landlocked. Because the maritime domain—the world’s oceans, seas, bays, estuaries, islands, coastal areas, littorals, and the airspace above them—supports 90% of the world’s trade, it carries the lifeblood of a global system that links every country on earth. Covering three-quarters of the planet, the oceans make neighbors of people around the world.” Albeit, these neighbors do not always get along.).

<sup>51</sup> KRASKA, *supra* note 50, at 95.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 96.

<sup>54</sup> *Id.*



Building upon this effort, the United Nations convened a Conference on the Law of the Sea (UNCLOS I) in 1958. Its goal was to clarify a State's navigational and economic rights within both its own coastal waters and those of other States.<sup>55</sup> Per Commander James Kraska, the Howard S. Levie Chair of Operational Law at the United States Naval War College, UNCLOS I failed to provide guidelines on "several critical and contentious points."<sup>56</sup> Issues such as the "breadth of the territorial sea" were not formally settled.<sup>57</sup> He rightly argues that failing to resolve this issue fatally impacted subsequent agreements as territorial seas basically serve as the bedrock foundation for all other navigational regimes. Chief among the other failures that Kraska illuminates is the lack of standardization of State claims of sovereignty over areas of the sea. These claims, he points out, "ranged from between 3–200 [nautical miles]" from the coastal State's low-water mark out into the sea.<sup>58</sup>

Besides failing to address key economic questions, which can be viewed more important at times than security, regarding State sovereignty over sea usage, UNCLOS I's disappointing lack of consensus on the coastal claim issue rendered nearly all other agreements highly disputable in actual practice.<sup>59</sup> In 1960, the UN convened the Second United Nations Conference on the Law of the Sea (UNCLOS II) and would, again, fail to meaningfully address the territorial sea issue.<sup>60</sup>

## B. Maritime Regime Formulation and Formalization

Although it would not formally open for signature until 1982, UNCLOS<sup>61</sup> grew out of nearly a decade of discussion, negotiation, and compromise begun in 1973 at the Third United Nations Conference on the Law of the Sea.<sup>62</sup> UNCLOS proved to be far more comprehensive than any of the previous efforts. Specifically, UNCLOS addressed the limits of State sovereignty in coastal waters and navigational regimes

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 97.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 98.

<sup>61</sup> For purpose of brevity, though the Third United Nations Conference on the Law of the Sea resulted in the 1982 treaty, it will be referred to as UNCLOS vice UNCLOS III.

<sup>62</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. [hereinafter UNCLOS].

within those limits by establishing measurable boundaries for such activities.<sup>63</sup> The resultant treaty “strikes a balance between the rights and duties of coastal States on the one hand, and of all other States on the other.”<sup>64</sup> Appropriately referred to as a “package deal” by Kraska, “seaward of the coastal baselines, [UNCLOS successfully created] distinct and shared functional areas . . . . These functional areas include the territorial sea, the contiguous zone and the EEZ.”<sup>65</sup> Each of these areas could not exist without the other. Beginning with the baseline, each regime incorporates its smaller-in-size contemporary. Thus, under UNCLOS, a coastal State’s sovereignty decreases as the distance from its shore increases. These areas are overlapping and complementary. UNCLOS “was constructed around an integrated set of mutually supporting regimes pertaining to geophysical areas on, over, or under the oceans.”<sup>66</sup> The most important factor, the lynch pin, is the baseline. These areas, and any attendant coastal State sovereignty over such, only exist where a baseline may be established. Thus, States desiring to maximize or extend their sovereignty over the sea must first establish a legitimate baseline.

As discussed in Part III, China relies on a “historic rights” argument to assert varying degrees of sovereignty over the vast majority of the South China Sea. Using this argument to gain a foothold over hotly disputed landmasses within the South China Sea, China seeks to establish a series of baselines, and thus their accompanying regimes.

Being the geographically largest of the regimes, the EEZ provides the coastal State with enormous economic opportunity.<sup>67</sup> Just as each coastal State desired to maximize its economic interests in its claimed EEZ, however, equal desire existed to maintain its navigational and operational freedoms in other States’ EEZs. As such, “[i]ntense debates arose [at UNCLOS] regarding the legal nature of coastal States in the same EEZ. The consensus developed that non-resource-related high seas freedoms, including the freedoms of navigation and overflight, and the freedoms to lay pipelines and submarine cables would be preserved in the EEZ.”<sup>68</sup> This consensus resulted in UNCLOS stating that “[i]n

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<sup>63</sup> *Id.*

<sup>64</sup> J. Ashley Roach & Robert W. Smith, *Excessive Maritime Claims*, 66 INT’L L. STUD. 109 (1994).

<sup>65</sup> KRASKA, *supra* note 50, at 98.

<sup>66</sup> *Id.*

<sup>67</sup> See generally UNCLOS, *supra* note 62, arts. 53–75.

<sup>68</sup> Roach & Smith, *supra* note 64, at 109.

exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.”<sup>69</sup> The manner in which China exercises its “rights” and performs its “duties” undergirds this discussion.

Regarding economic interests in the EEZ, per UNCLOS, coastal States possess

sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds<sup>70</sup>

Notably, UNCLOS delineates between a coastal State’s sovereign rights and its jurisdiction.<sup>71</sup> Specifically, a coastal State has “jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; [and] (iii) the protection and preservation of the marine environment.”<sup>72</sup>

Nearly twenty years since UNCLOS entered into force in 1994 one hundred and sixty-two countries have ratified the treaty, a fact that significantly weakens arguments that UNCLOS does not reflect customary international law.<sup>73</sup>

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<sup>69</sup> UNCLOS, *supra* note 62, art. 56.

<sup>70</sup> Roach & Smith, *supra* note 64, at 109.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Chronological Lists of Ratifications of Accessions and Successions to the Convention and the Related Agreements as of 03 June 2011*, *supra* note 45.

### C. One Sea, So Many EEZs

As drawn from a coastal State's baseline, an EEZ extends two-hundred nautical miles seaward.<sup>74</sup> Thus establishment of a legitimate baseline must precede the creation or claim of an EEZ. Not surprisingly, there are many areas of the world where, due to geography, neighboring or adjacent coastal States possess EEZs that extend less than two-hundred nautical miles or lie superjacent. Such locations are often the sites of heavy nautical and aeronautical traffic. The South China Sea is one such place. (See Figure 1.) China's claims of sovereignty and jurisdictional rights within the South China Sea conflict with the established EEZ of Vietnam, Indonesia, Malaysia, Brunei, and the Philippines. China's claim is hotly contested by all parties.



Figure 1. Map of the Overlapping EEZs in the South China Sea.<sup>75</sup>

<sup>74</sup> UNCLOS, *supra* note 62, art. 57. “The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.”

<sup>75</sup> *Vietnam Accuses China in Seas Dispute*, BBC.co.uk, <http://www.bbc.co.uk/news/world-asia-pacific-13592508> (last visited Feb. 22, 2013). Note the overlapping Exclusive Economic Zones of each State that has a coastline on the South China Sea. See *China and Vietnam: Clashing Over an Island Archipelago*, *supra* note 46. China's claims of territorial sovereignty and historic waters are obviously grossly contentious as nearly eighty percent of the South China Sea falls within its U-shaped line.

### III. The Pen: China's Maritime Lawfare Effort

While the term “lawfare” is a western creation that exists more in scholarly circles than in the strategic planning rooms of major military powers, China’s espouses it as a formal part of its military doctrine.<sup>76</sup> “In 2003, the CCP [Chinese Communist Party] Central Committee and the CMC [Central Military Committee] endorsed the ‘three warfares’ concept, reflecting China’s recognition that as a global actor, it will benefit from learning to effectively utilize the tools of public opinion, messaging, and influence.”<sup>77</sup> The “three warfares” are psychological warfare, media warfare, and legal warfare.<sup>78</sup> “During military training and exercises, PLA [People’s Liberation Army] troops employ the ‘three warfares’ to undermine the spirit and ideological commitment of the adversary. In essence, [the three warfares are a] non-military tool used to advance or catalyze a military objective.”<sup>79</sup>

The goals behind China’s use of legal warfare (or lawfare) are multi-fold. By using “international and domestic law . . . [i]t can be employed to hamstring an adversary’s operational freedom . . . build international support and manage possible political repercussions of China’s military actions.”<sup>80</sup> China recognizes lawfare as an effective tool of national strategy and formally employs it as such.

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<sup>76</sup> U.S. DEP’T OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE’S REPUBLIC OF CHINA 26 (2011) [hereinafter 2011 PRC REPORT], available at [http://www.defense.gov/pubs/pdfs/2011\\_cmpr\\_final.pdf](http://www.defense.gov/pubs/pdfs/2011_cmpr_final.pdf).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

Psychological Warfare seeks to undermine an enemy’s ability to conduct combat operations through operations aimed at deterring, shocking, and demoralizing enemy military personnel and supporting civilian populations. Media Warfare is aimed at influencing domestic and international public opinion to build support for China’s military actions and dissuade an adversary from pursuing actions contrary to China’s interests.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

### A. Historical Claim<sup>81</sup>

To understand China's claim to a having the right to dictate limitations to foreign maritime navigation and activity within the South China Sea, that is, within the waters surrounded by the "U-shaped line" one must first understand China's underlying lawfare argument for sovereignty over the islands and the basic geography that encompasses the area. This argument comprises three overlapping parts: national history, established customary international law, and self-created precedent.

With an amazing degree of consistency, China is rather unique in that it can trace its cultural origins back over nearly four thousand years.<sup>82</sup> Notably, major political power switches occurred internally rather than through conquest by an external power.<sup>83</sup> Because China sustained only internal switches in power, numerous ancient historical documents survived the centuries.<sup>84</sup> It is from these documents that China and some present-day scholars build the foundation of their sovereignty claim over the South China Sea islands.

China's historical argument cites to supporting documentation and governmental action taken during three time periods: the Pre-Modern Era (2000 Before Christ (B.C.)–1911 *Anno Domini* (A.D.)), the Republic of China Era (1911–1949), and the People's Republic of China Era (1949–present).

#### 1. *The Pre-Modern Era (2000 B.C.–1911 A.D.)*

Supporters of China's historic right argue that China has maintained control of the islands within the U-Shaped Line for literally thousands of years and that it was not until the last century that this control was contested.<sup>85</sup> Supporters state that control or sovereignty over the islands

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<sup>81</sup> This section does not address the historical accuracy of China's claims due to space limitation, but rather will explain and analyze the merits of China's position taken at face value.

<sup>82</sup> Jianming Shen, *China's Sovereignty over the South China Sea Islands: A Historical Perspective*, 1 CHINESE J. OF INT'L L. 94, 94–157 (2002).

<sup>83</sup> See generally FRANZ MICHAEL, CHINA THROUGH THE AGES: HISTORY OF A CIVILIZATION (1986).

<sup>84</sup> *Id.*

<sup>85</sup> Shen, *supra* note 82, at 98.

in the South China Sea began to manifest as early as the 21st century B.C. with the receipt of “tributes” from that area.<sup>86</sup> Ancient historical documents that reference trade records from the Zhou, Xia, and Shang Dynasties are used as evidence that the South China Sea islands were “already destinations of Chinese expeditions and targets of conquest” as early as 770 B.C.<sup>87</sup> In fact, China asserts that it was the first nation to name the South China Sea and its islands.<sup>88</sup> From China’s perspective, though dynasties often used different terms to refer to the Sea and its islands, it is the Chinese acts of continuously renaming and referring to the South China Sea and its islands that support its historical claim of sovereignty.<sup>89</sup>

These terms, however, can often change depending upon the context in which they are used.<sup>90</sup> Pro-sovereignty scholars argue that the fluid nature of these name changes is not a weakness in China’s claim since the majority of the changes occurred before other States made opposing claims.<sup>91</sup>

In addition, China’s geographic proximity to the South China Sea and its islands is a factor in its assertion that it was the “first [nation] to have made expeditions and voyages to and across the South China Sea islands.”<sup>92</sup> This proximity makes it probable that China, to at least some extent, used or traversed the South China Sea for trade purposes.<sup>93</sup> Pro-

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<sup>86</sup> *Id.* at 102. See also *Calls Grow in China to Press Claim for Okinawa*, THE NEW YORK TIMES.COM, <http://www.nytimes.com/2013/06/14/world/asia/sentiment-builds-in-china-to-press-claim-for-okinawa.html> (last visited June 13, 2013). A few days prior to a seminar sponsored by Remnim University, a senior member of China’s armed forces “argued that the Japanese did not have sovereignty over the Ryukyu Islands because its inhabitants paid tribute to Chinese emperors hundreds of years before they started doing so to Japan. For now, let’s not discuss whether they belong to China—they were certainly China’s tributary state,” the official, Maj. Gen. Luo Yuan, told the state-run China News Service. “I am not saying all former tributary states belong to China, but we can say with certainty that the Ryukyus do not belong to Japan.” Outside of China, the Ryukyus is referred to as Okinawa.

<sup>87</sup> *Id.* at 104.

<sup>88</sup> *Id.* at 105.

<sup>89</sup> *Id.* at 105–06.

<sup>90</sup> *Id.* at 106.

<sup>91</sup> *Id.* at 107.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

sovereignty scholars argue that these voyages grant a degree of sovereignty to China.<sup>94</sup>

Continuing with its expansion argument, China avers that it was the first organized State-like entity to possess any level of detailed knowledge of the geographic features of the South China Sea islands.<sup>95</sup> This knowledge, China contends, came from the formal establishment of open sea lanes within the Sea through exploration and regular usage.<sup>96</sup> China also takes credit for establishing safe navigational routes within the South China Sea that nearby trade partners benefited from for centuries.<sup>97</sup> Naval patrols, scientific surveys, and mapping by governing powers compromise the final elements of China's ancient history argument.<sup>98</sup>

## 2. Republic of China Era (1911–1949)

By the early 20th century, the frequent renaming of the islands and heavy reliance upon historical records and foreign maps gave rise to contradictory claims of Chinese sovereignty.<sup>99</sup> To codify its claims, the Chinese government formed a Land and Water Maps Inspection Committee (Committee) in 1933.<sup>100</sup> The Committee's mandate was to assist in the formation of official maps that delineated China's modern national boundaries.<sup>101</sup> Although formal surveys began before the Committee's formation, the endeavor continued through 1947.<sup>102</sup> These efforts represented the Chinese government's first "large-scale" undertaking to survey the South China Sea; it included the renaming of the "islands, reefs, and low tide elevations in the South China Sea."<sup>103</sup> In 1935, the Committee published the first official modern Chinese map of the South China Sea. (See Figure 2.) This map includes the islands

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<sup>94</sup> Supporters portray China as a nascent sea-going State, yet there is disagreement in some scholastic quarters as to the importance ancient China placed upon oceanic exploration.

<sup>95</sup> Shen, *supra* note 82, at 112–17.

<sup>96</sup> *Id.* at 117.

<sup>97</sup> *Id.* at 118.

<sup>98</sup> *Id.* at 122–26.

<sup>99</sup> Li & Li, *supra* note 40, at 288–89.

<sup>100</sup> *Id.* at 289.

<sup>101</sup> *See id.*

<sup>102</sup> Shen, *supra* note 82, at 107.

<sup>103</sup> Li & Li, *supra* note 40, at 289.



within its sphere; notably, the the Spratly Islands, Macclesfield Bank, Pratas Islands, and Paracel Islands.<sup>104</sup>

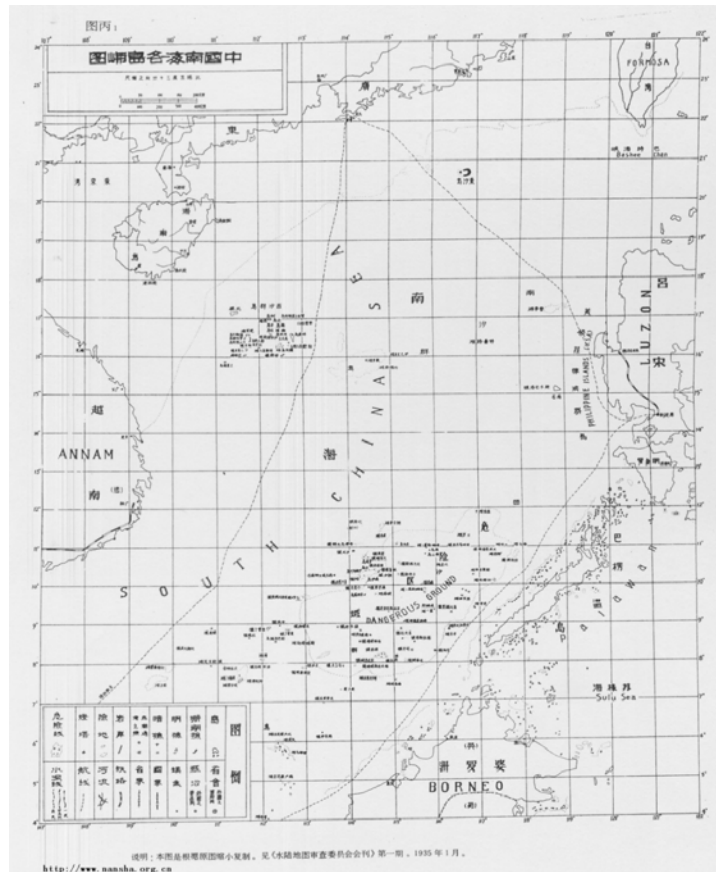


Figure 2. Map of the South China Sea Islands in 1935.<sup>105</sup>

<sup>104</sup> Shen, *supra* note 82, at 128–29.

<sup>105</sup> *Map of South China Sea Islands in 1935*, SPRATLYS.ORG, <http://www.spratlys.org/maps/4.htm> (last visited Nov. 2, 2012).

At specific issue were the Spratly Islands, Macclesfield Bank, Pratas Islands, and Paracel Islands. And although all four land areas were again included as Chinese territory in a map issued by the Committee in 1936, China's claim over the Spratly Islands and Macclesfield Bank proved particularly contentious. Occupied by France in 1933, China claimed that the Spratly Islands and Macclesfield Bank served as a home for Chinese fishermen.<sup>106</sup> Ultimately, France conceded this assertion<sup>107</sup> and retracted its claim over the Spratly Islands and Macclesfield Bank after the close of World War II.<sup>108</sup> Yet, in the intervening period, Japan forcibly occupied the Spratly and Paracel Islands, effectively removing any control or authority China or any other State had previously exercised over them.<sup>109</sup> Japan "renamed the *Nansha* [Spratly] island chain *Shinnam Gunto* . . . and placed these islands under the jurisdiction of Taiwan, which had been under Japanese rule since 1895."<sup>110</sup> Japan withdrew its forces as World War II ended.<sup>111</sup>

While Japan made no formal declarations to return its captured territory to any one State until 1952, including any islands within the South China Sea, some scholars argue that China's sovereignty over the Spratly and Paracel Islands "would not and should not depend on Japan's renunciation of claims and/or [sic] any international scheme of disposition . . . ."<sup>112</sup> Furthermore, although "the West regarded Japan as the administrator of the entire South China Sea Islands for the period of its occupation, it is highly questionable whether Japan established its title to these island groups at all, because invasion and occupation *per se* do not suffice to acquire title to territory."<sup>113</sup> This stance presumes that China's asserted historic title to the islands within the South China Sea was absolute and internationally accepted before the 1930s.

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<sup>106</sup> Li & Li, *supra* note 40, at 289.

<sup>107</sup> PAO-MIN CHANG, *THE SINO-VIETNAMESE TERRITORIAL DISPUTE* 14 (1986).

<sup>108</sup> Li & Li, *supra* note 40, at 289.

<sup>109</sup> See Shen, *supra* note 82, at 136.

<sup>110</sup> *Id.*

<sup>111</sup> See *id.* at 136–42.

<sup>112</sup> *Id.* at 138.

<sup>113</sup> *Id.*

In 1947 the Chinese government again renamed all of the South China Sea islands.<sup>114</sup> Additionally, as a means to “demonstrate authority” over the islands, China stationed personnel on certain islands and provided security and communication assistance to Chinese fishermen in the area.<sup>115</sup> Today, these actions are offered by pro-sovereignty scholars as further proof that the Chinese government had “defined” its “territorial sphere” thus granting at least some element of sovereignty over the South China Sea and its islands.<sup>116</sup>

#### *Advent of the U-Shaped Line*

Chinese scholarly and governmental assertions of sovereignty over the South Sea Islands rely heavily and consistently upon maps, both ancient and modern.<sup>117</sup> In building the case for sovereignty in the historical context, supporters cite dozens, if not hundreds, of individual instances of Chinese interaction or comment on the islands in an effort to build an insurmountable mountain.<sup>118</sup>

In 1947, the Chinese Department of Geography, an agency within the Ministry of Internal Affairs, issued a new map encompassing the South China Sea and its islands. This map included an “Eleven-Dotted Line.” Often referred to as the “U-shaped line,” located within the boundaries of the Eleven-Dotted Line are the Spratly Islands, the Macclesfield Bank, the Paracel Islands, the Pratas Islands, and the majority of open waters within the South China Sea.<sup>119</sup> (See Figure 3.)

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<sup>114</sup> Li & Li, *supra* note 40, at 289–90 (“The Spratly and the Paracel Islands were renamed on the basis of their geographic location in the South China Sea, and the names of the islands and reefs in other areas of the South China Sea were checked and announced by the Geography Department in the Ministry of Internal Affairs.”).

<sup>115</sup> *Id.* at 290.

<sup>116</sup> *Id.* at 289–90.

<sup>117</sup> Shen, *supra* note 82, at 128–32.

<sup>118</sup> *Id.* at 94–157.

<sup>119</sup> Li & Li, *supra* note 40, at 290.



Figure 3. 1947-Issued “Eleven-Dotted Line” Map.<sup>120</sup>

The 1947 map that introduced the Eleven-Dotted Line is one of the most influential and relied-upon references for pro-sovereignty supporters of China’s claim over the South China Sea and its islands.<sup>121</sup> Supporters argue that the creation of the “U-shaped line” was meant to indicate and reconfirm China’s ownership of the South China Sea islands and the surrounding waters.<sup>122</sup> Yet, the publication of the map and its itinerant versions was not accompanied by any official statement asserting such.<sup>123</sup>

<sup>120</sup> 1947 Map of South China Sea Islands (Published by Secretariat of Guangdong Province Government), NANSHA.ORG.CN, [http://www.nansha.org/cn/maps/3/1947\\_South\\_China\\_Sea\\_Map.html](http://www.nansha.org/cn/maps/3/1947_South_China_Sea_Map.html) (last visited Sept. 26, 2013).

<sup>121</sup> See Li & Li, *supra* note 40. See also Shen, *supra* note 82; Keyuan, *supra* note 44.

<sup>122</sup> *Id.*

<sup>123</sup> Shen, *supra* note 82, at 129. There is great dispute within scholarly circles as to the intent behind the creation of the line, the legal effect, if any, of the inclusion of the line on official Chinese government created maps, and its impact upon developing theories of maritime claims vis-à-vis both formal treaty law and customary international law.

### 3. *The People's Republic of China Era (1949–Present)*

The Allied forces' defeat of Japan in 1945, and the end of WWII, resulted in a large-scale retreat of foreign forces from China's mainland and claimed islands. Additionally, post WWII, a power vacuum emerged in China in which a burgeoning communist movement led by a fiery, 52-year old, Mao Zedong, challenged the Nationalist government for control of the country.<sup>124</sup>

Mao was strident in his belief that the China of old must be cast away. Yet, through all of the social and, more specifically, governmental purges that followed his rise to power,<sup>125</sup> the official maps of Chinese territory released by Mao's new government remained very similar to those released by Chiang Kai-shek's nationalist regime. Thousands of people did not survive the communist takeover of China, but the Eleven-Dotted Line did.

#### *The Nine-Dotted Line*

In 1949, the People's Republic of China (PRC) released its first official map of China.<sup>126</sup> The map showed an eleven-dotted line in the South China Sea that closely mirrored the original map from 1937.<sup>127</sup> In 1953, PRC Premier Zhou Enlai approved the removal of two dotted lines from official maps.<sup>128</sup> (The two dotted lines that were removed encapsulated the Gulf of Tonkin off of the Vietnamese coastline.) Consequently, a new Nine-Dotted line began appearing on Chinese maps that same year. It has appeared on most official Chinese maps since 1953.<sup>129</sup> (See Figures 4 and 5.) Like its Eleven-Dotted Line predecessor, the Nine-Dotted Line still encompasses most of the South China Sea and its islands—including the Spratly Islands, the Macclesfield Bank, the Paracel Islands, and the Pratas Islands.

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<sup>124</sup> JONATHAN SPENCE, *THE GATE OF HEAVENLY PEACE* 81 (1981).

<sup>125</sup> JOHN KING FAIRBANK, *THE UNITED STATES AND CHINA* 239–45, 278–303 (1971).

<sup>126</sup> Li & Li, *supra* note 40, at 290.

<sup>127</sup> Shen, *supra* note 82, at 129.

<sup>128</sup> Li & Li, *supra* note 40, at 290.

<sup>129</sup> *Id.*

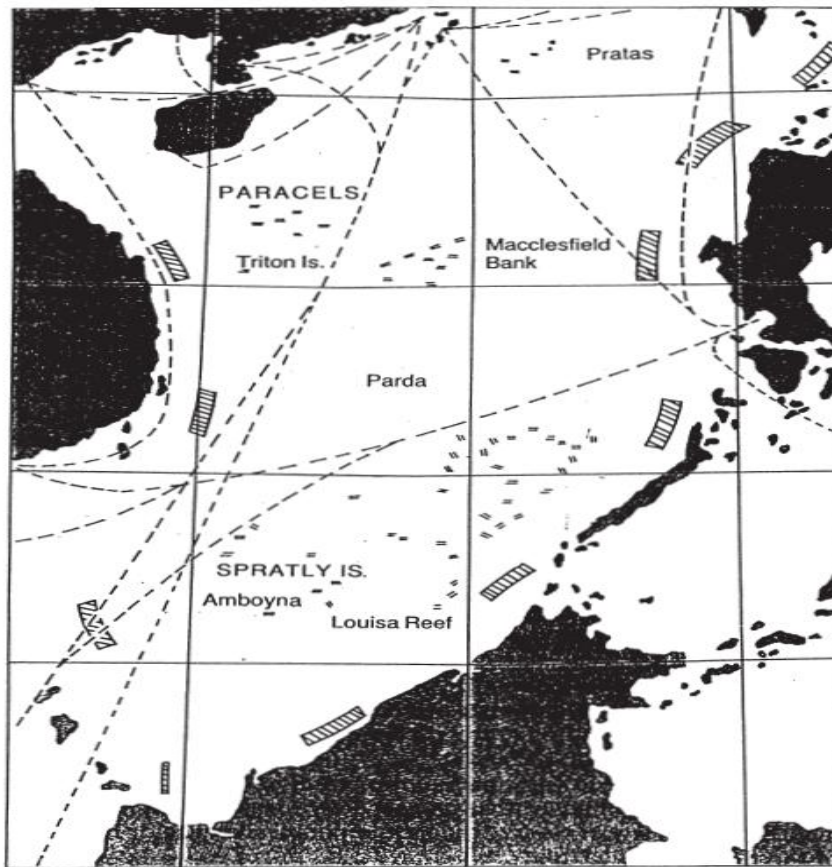


Figure 1. The nine-dotted line on the Chinese map of the South China Sea. (Source: Hasjim Djalal, "Conflicting Territorial and Jurisdictional Claims in South China Sea," *The Indonesian Quarterly*, vol. 7, no. 1 (1979), 36 at 52.

Figure 4.<sup>130</sup>

<sup>130</sup> DJALAL, *supra* note 43, at 52.

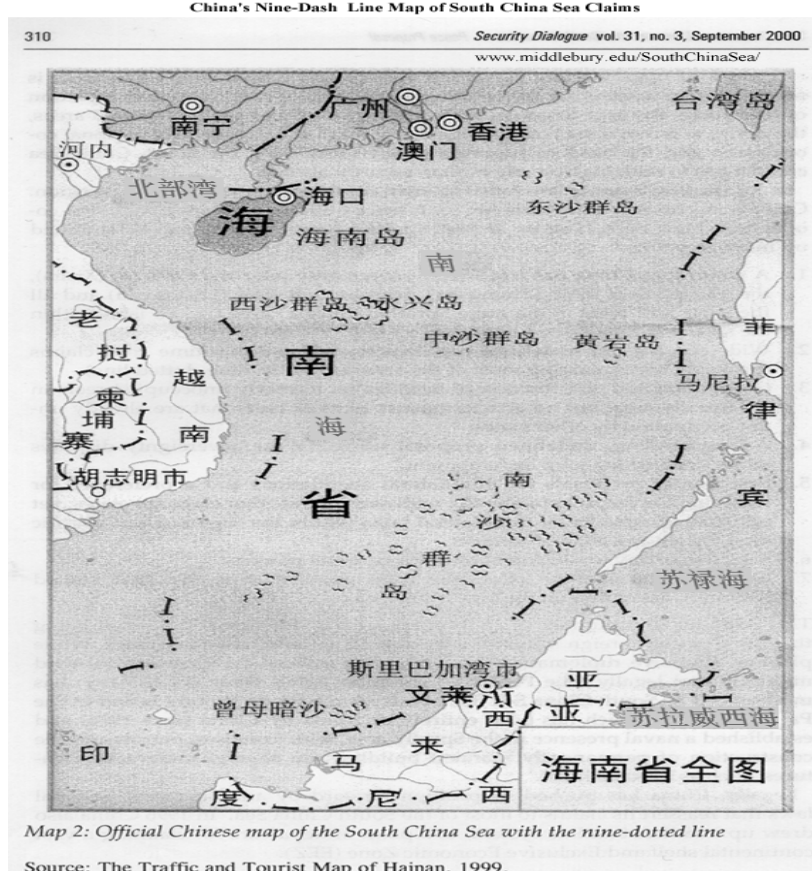


Figure 5. 1999 Map of the Nine-Dotted Line.<sup>131</sup>

## B. Customary International Law

It is difficult to fully separate China's history-based claims to sovereignty in the South China Sea from accepted modern notions of prolonged possession or ownership under CIL. The problematic aspect for China in asserting its claim for historic waters lies in the fact that

<sup>131</sup> 1999 Map of the Nine-Dotted Line, SPRATLYS.ORG, [http://www.spratlys.org/maps/1/hainan\\_map1999.gif](http://www.spratlys.org/maps/1/hainan_map1999.gif) (last visited Sept. 26, 2013).

international law does not provide one all-encompassing and accepted definition for such.<sup>132</sup>

Historically, States' claims for historic waters primarily applied to bays or wider gulfs.<sup>133</sup> Often, such claims are highly contested by the international community due to the economic, strategic, and general navigational problems that would be created by having such large areas of water considered the internal waters of any one particular State. A notable example is the Gulf of Sidra.<sup>134</sup>

Bordered entirely by Libya, the Gulf of Sidra covers over 22,000 square miles of water and, at its widest point, extends nearly one hundred and forty miles from its opening to the Libyan coast.<sup>135</sup> After the military takeover of Libya by Colonel Muammar Quaddafi in 1969, the Libyan government made a series of announcements regarding its claims of jurisdiction and sovereignty in its surrounding waters.<sup>136</sup> In 1974, this effort culminated with the Libyan government declaring the Gulf of Sidra to be a historic bay.<sup>137</sup> This meant that Libya considered all waters south of the Gulf of Sidra's two-hundred and ninety-six mile-wide opening to be internal waters.<sup>138</sup> Accordingly, Libya closed the Gulf of Sidra to all foreign navigation absent prior Libyan permission.

As discussed above, one of the key criteria to the establishment of a historic claim is the extent to which other States accept or contest the claim. Thus, it follows that States who wish to contest the claim must take actions commensurate with their stance—as inaction may be viewed as acquiescence to the claim. As a major naval power with global strategic interests, the United States expressly objected to Libya's claim that the Gulf of Sidra was a historic bay.<sup>139</sup> Grave repercussions can result from extraordinary maritime claims: in August, 1981, a Libyan fighter jet fired upon two U.S. Navy F-14 fighters conducting an exercise near the Gulf of Sidra.<sup>140</sup> (The Libyan government considered any

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<sup>132</sup> Zou Keyuan, *South China Sea Studies in China: Achievements, Constraints and Prospects*, 11 SING. Y.B. OF INT'L L. 85, 90 (2007).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 91.

<sup>135</sup> Yehuda Z. Blum, *The Gulf of Sidra Incident*, 80 AM. J. OF INT'L L. 668, 668 (1986).

<sup>136</sup> *Id.*

<sup>137</sup> Keyuan, *supra* note 132, at 91.

<sup>138</sup> *Id.*

<sup>139</sup> John M. Spinnato, *Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra*, 13 OCEAN DEV. & INT'L L. 1, 65 (1983).

<sup>140</sup> *Id.*



previously unauthorized overflight of the Gulf to be a violation of its national airspace—as would be consistent with recognized internal waters.)<sup>141</sup> The U.S. Navy jets engaged the Libyan fighter and shot it down.<sup>142</sup> The United States continued to perform overflight operations (or “operational assertions”) in the Gulf of Sidra throughout 1984, 1986, 1997, 1998, and 2000.<sup>143</sup>

Establishing a standard definition or criteria for determining the validity of historic maritime claims is essential to not only avoiding military conflict between States but to strengthening the legitimacy of maritime CIL. Yet no single suggestion stands as fully authoritative over the rest. Zou Keyuan, Harris Professor of International Law at the Lancashire Law School of the University of Central Lancashire, United Kingdom, suggests using the very reasonable and “scholarly definition” espoused by Leo J. Bouchez as a starting point.<sup>144</sup> A former Adjunct Professor of International Law at the University of Utrecht, Professor Bouchez stated that “[h]istoric waters are waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States.”<sup>145</sup> This definition bears serious consideration because

[h]istoric waters are an exception to the general rules governing the sovereignty of coastal states over the adjacent waters. Such an exception cannot be justified by merely invoking a particular geographic configuration of the coast. Claims to historic waters will

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> U.S. DEP’T OF DEF., DIR. 2005.1-M, MARITIME CLAIMS REFERENCE MANUAL (June 2008) [hereinafter DOD DIR 2005.1-M], available at [www.dtic.mil/whs/directives/corres/20051m\\_062305/libya.doc](http://www.dtic.mil/whs/directives/corres/20051m_062305/libya.doc).

<sup>144</sup> Keyuan, *supra* note 132, at 90. To bolster his argument that the notion of historic waters lacks a foundation treaty law, Professor Keyuan cites the fact that the International Law Commission of the United Nations addressed the juridical regime of historic waters and historic bays in 1962. He points out that the report “did not give a conclusive concept of historic waters and the standard according to which this concept could be applied.” He further notes that the “Third U.N. Conference on the Law of the Sea simply dropped the issue for discussion and only left some wordings in the LOS Convention.”

*Id.*

<sup>145</sup> LEO J. BOUCHEZ, THE REGIME OF BAYS IN INTERNATIONAL LAW 281 (1964).

arise only if coastal States seriously show their interest in the water area involved.<sup>146</sup>

The sovereign control criteria that requires the claimant State's control be clear, effective, continuous, and conducted over a substantial period of time is absolutely essential given the ramifications of the claim. What one State possesses, another is denied. While much of international law governs how States interact and communicate with one another, laws and guidelines concerning State ownership or control of lands and seas must be carefully delineated and followed as, from general historic context, wars are waged over such.<sup>147</sup>

Professor Keyuan modifies Bochez's criteria by distilling it into three distinct standards that the claim should be judged by: (1) the time the claimant State has exercised "authority" over the waters; (2) the "continuity over time of this exercise of authority;" and (3) "the attitude of foreign States to the claim."<sup>148</sup> Keyuan's proposal is compelling but lacks any language concerning evidentiary standards. Disagreements over what exercising "authority" means both support and detract from China's position. Therefore, incorporating Bochez's requirements that the exercise of authority must be "clear," but more importantly "effective" is a must.<sup>149</sup> Additionally, Bochez more clearly articulates a measureable standard by using "acquiescence" in reference to the international community than Keyuan does with "attitude."

China argues that its claims to historic rights over the island and waters within the U-shaped line are not without CIL support. Technically, this position is correct. Viewed through Keyuan's lens, China's assertion for historic sovereignty attempts to meet his criteria. The problem is not one of novelty but strength of fact. China does not possess the evidence required to pass Keyuan's test, especially in light of Bochez's guiding evidentiary criteria. In fact, none of the South China

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<sup>146</sup> *Id.* at 297.

<sup>147</sup> It is possible to cite innumerable examples of armed conflicts of both major and minor intensity that had territorial disputes and aims as explicit motivating factors. *E.g.*, WOODRUFF D. SMITH, *THE IDEOLOGICAL ORIGINS OF NAZI IMPERIALISM* (1986). At the outset and continuing through the bloodiest conflict in history, World War II, Adolf Hitler espoused the concept of "Lebensraum" or "living space" as one of his primary foreign policy goals.

<sup>148</sup> Keyuan, *supra* note 132, at 90.

<sup>149</sup> Bouchez, *supra* note 145, at 281.

Sea nations do. This is, however, something China is strongly seeking to correct or, more accurately, create.

### C. The Third United Nations Convention on the Law of the Sea

As discussed above, the United Nations conducted several formal efforts at creating a formal, treaty-based, Law of the Sea.<sup>150</sup> Initiated as an attempt to formalize customary international sea-going practices in effect since the 1600s, UNCLOS's work constitutes the most recent, authoritative, and widely accepted body of international law governing State conduct and use of the world's oceans.<sup>151</sup> UNCLOS fulfills the hope of Conference President Koh that the document be considered a "constitution" for the oceans.<sup>152</sup> The goal in its creation was to establish an international agreement that addressed "as many issues falling under the heading 'law of the sea' as possible."<sup>153</sup>

UNCLOS is specifically relevant to claims of territorial and water sovereignty in the South China Sea as it provides definitions for what legally constitutes an island, rock, shoal, etc.<sup>154</sup> For example, Article 121, Regime of Islands, states the following concerning rocks: "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."<sup>155</sup> Regarding islands, they must be "a naturally formed area of land, surrounded by water, which is above water at high tide."<sup>156</sup> Thus, the distinction between rocks and islands is of enormous importance to the claiming State as Article 121 also provides that "the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory."<sup>157</sup> Simply put, a State may measure and, hence, assert control over the preceding maritime

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<sup>150</sup> *The United Nations Convention on the Law of the Sea (A Historical Perspective)*, UN.ORG, [http://www.un.org/Depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm) (last visited on Jan. 30, 2013).

<sup>151</sup> UNCLOS, *supra* note 62. The treaty entered into force on November 14, 1994.

<sup>152</sup> JAMES KRASKA, CONTEMPORARY MARITIME PIRACY: INTERNATIONAL LAW, STRATEGY, AND DIPLOMACY AT SEA 122 (2011).

<sup>153</sup> Ian Townsend-Gault, *Compliance with the United Nations Convention on the Law of the Sea in the Asia-Pacific Region*, 33 U. BRIT. COLUM. L. REV. 227, 230 (1999-2000).

<sup>154</sup> UNCLOS, *supra* note 62.

<sup>155</sup> *Id.* art. 121.3.

<sup>156</sup> *Id.* art. 121.1.

<sup>157</sup> *Id.* art. 121.2.

zones from the low-water point of an island, but not a rock. Unsurprisingly, it greatly behooves a State to argue that various formations within the sea area in question are in fact islands, not rocks, as the potential strategic and economic gains can be vast.

In theory, UNCLOS provides China with a compelling opportunity. While China proceeds to press its claim for sovereignty over the waters within the U-shaped line from a historical perspective, the fact remains that several of the States with competing territorial claims in the South China Sea can assert, with some level of reliability, variations of their own historic claims.<sup>158</sup> What UNCLOS creates, however, is the opportunity for China to anchor its claim to the waters within formal treaty law. Or, put another way, UNCLOS provides the opportunity for recognized legal validity.

#### *1. UNCLOS as a Weapons System*

While far from easily accomplished, China's primary strategy under UNCLOS comprises two sequential steps. The first step, and probably most problematic given other States' competing claims, is to establish sovereignty over any of the land formations in question in the South China Sea.<sup>159</sup> Second, China must settle the issue as to which of the formations may be formally and legally recognized as an island since any such recognized island would serve as a literal foothold for Chinese sovereignty within the South China Sea. Moreover, such a foothold would legally endow China with all UNCLOS-designated maritime zones and their attendant benefits, e.g., natural resources, navigation restrictions, etc.

In reality, there is little chance of States such as Vietnam and the Nation of Brunei, abandoning their asserted claims to certain islands in the South China Sea. Simply stating a claim, however, may not be enough if one of the competing States can demonstrate, over time, a certain amount of control over the lands or waters in question. To this end, China is also attempting to redefine basic navigational and operational freedoms provided for under UNCLOS. By slowly chipping away at what foreign vessels are traditionally allowed to do in the South

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<sup>158</sup> DOD DIR. 2005.1-M, *supra* note 143.

<sup>159</sup> Spratly Islands, Macclesfield Bank, Pratas Islands, and Paracel Islands.

China Sea, China seeks to create a self-enforced precedent under international law.

2. “*You Keep Using that Word. I Do Not Think It Means What You Think It Means.*”<sup>160</sup>

In July 2009, the U.S. Naval War College in Newport, Rhode Island, hosted a workshop intended to “discuss different perspectives held by the United States and China on the legitimacy of foreign military activities in a coastal state’s EEZ.”<sup>161</sup> The War College published eight papers presented at the conference, four from the United States delegation and four from the Chinese delegation.<sup>162</sup> Scholars and military members from both States comprised the authorship.<sup>163</sup> China’s position regarding its intent at the workshop is quite clear as a survey of the papers presented by the Chinese speakers denotes a concerted effort to argue that established Law of the Sea terms used within CIL and UNCLOS actually have different meanings than understood by the United States.<sup>164</sup>

Citing the USNS *Impeccable* incident, Major General Peng Guangqian, PLA (Ret.) raised the issue of military operations in the EEZ. He noted that “the legal status of the [EEZ] is not exactly the same as territorial waters under international law . . . [it] is absolutely not equivalent to the high seas; rather it is a special area governed by the coastal state.”<sup>165</sup> While Major General Guangqian did agree that “UNCLOS has no special article to define clearly the limits of military activities in the [EEZ] of other countries,” he asserted that the “basic legislative purpose and legislative spirit of UNCLOS is that [military] operations may be undertaken ‘only for peaceful purposes.’”<sup>166</sup>

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<sup>160</sup> THE PRINCESS BRIDE (Twentieth Century Fox Film Corporation 1987).

<sup>161</sup> PETER DUTTON, *Introduction*, in MILITARY ACTIVITIES IN THE EEZ: A U.S.-CHINA DIALOGUE ON SECURITY AND INTERNATIONAL LAW IN THE MARITIME COMMONS, 7 NAVAL WAR C. MAR. STUD. INST. 1, 2 (Naval War College Press, 2010).

<sup>162</sup> MILITARY ACTIVITIES IN THE EEZ: A U.S.-CHINA DIALOGUE ON SECURITY AND INTERNATIONAL LAW IN THE MARITIME COMMONS, 7 NAVAL WAR C. MAR. STUD. INST. (Naval War College Press, 2010).

<sup>163</sup> DUTTON, *supra* note 161, at 2.

<sup>164</sup> MILITARY ACTIVITIES IN THE EEZ, *supra* note 162.

<sup>165</sup> Peng Guangqian, *China’s Maritime Rights and Interests*, in MILITARY ACTIVITIES IN THE EEZ: A U.S.-CHINA DIALOGUE ON SECURITY AND INTERNATIONAL LAW IN THE MARITIME COMMONS, 7 NAVAL WAR C. MAR. STUD. INST. 15, 20 (Naval War College Press, 2010).

<sup>166</sup> *Id.*

Although he invokes UNCLOS's provision that "[t]he high seas should be reserved for peaceful purposes," he notes that the *Impeccable* was not sailing on the high seas at the time of the incident.<sup>167</sup> But "even if it had [been]," he argues, UNCLOS's language relating to "peaceful purposes" does not allow for the type of military survey mission conducted by the *Impeccable* regardless of its location.<sup>168</sup> He concludes that absent "consent . . . granted by the coastal state six months in advance . . ." the *Impeccable's* mission is tantamount to "military activity that is harmful to the coastal state's sovereignty or security in the [EEZ] and cannot be tolerated. To do otherwise would be to mock and blaspheme international law."<sup>169</sup> Major General Guangqian's argument signifies an attempt to deny those, like the United States, who support the legality of the *Impeccable's* mission a legal safe harbor.<sup>170</sup>

The United States' position is that the *Impeccable's* mission constituted a military survey activity (MSA).<sup>171</sup> China contends that the mission was one of marine scientific research (MSR) vice MSA.<sup>172</sup> In his argument, Guangqian seeks to deny the United States the legal ability to classify the mission as MSA as he asserts that all such military-type activity is unlawful in the EEZ and on the high seas.<sup>173</sup> If successful, the United States' argument would be legally null, perhaps forcing the United States to redefine its operations as MSR.

Classifying all MSA as MSR would serve China's interests. All MSR in the EEZ is, as Chinese presenter, Wu Jilu, argued, subject to the coastal state's jurisdiction.<sup>174</sup> "It is very clear that in the [EEZ], the convention treats activities related to resource development and

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> The argument is also grossly expansive as it purports to prohibit such MSA missions in virtually all waters absent a coastal State's consent, even in waters where no coastal State has authority.

<sup>171</sup> Raul Pedrozo, *Coastal State Jurisdiction over Marine Data Collection in the Exclusive Economic Zone, in Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons*, 7 NAVAL WAR C. MAR. STUD. INST. 23, 27-34 (Naval War College Press, 2010).

<sup>172</sup> ZHIRONG, *supra* note 38, at 37-47.

<sup>173</sup> Guangqian, *supra* note 165, at 20.

<sup>174</sup> Wu Jilu, *The Concept of Marine Scientific Research, in MILITARY ACTIVITIES IN THE EEZ: A U.S.-CHINA DIALOGUE ON SECURITY AND INTERNATIONAL LAW IN THE MARITIME COMMONS*, 7 NAVAL WAR C. MAR. STUD. INST. 65, 70-71 (Naval War College Press, 2010).

environment protection separately from [MSR] . . . Thus, within the EEZ research activities directly related to resource development and environmental protection are not MSR.”<sup>175</sup> Thus it follows, per Jilu, that “[a]ll remaining activities, including . . . military survey activities, are therefore considered part of [MSR], subject to the jurisdiction of the coastal State.<sup>176</sup> In essence, the Chinese argument would prohibit all MSR missions on the high seas and within EEZs absent the coastal State’s express consent. Similar to its arguments for sovereignty under theories of historic waters, CIL, and UNCLOS, China’s effort to redefine certain terms are an external lawfare mechanism to establish small areas of control over its contested waters.<sup>177</sup> There is, however, an internal (domestic) companion effort that is the most illuminative of China’s intentions.

#### D. Chinese Domestic Law

In the background of China’s external lawfare efforts lie two pieces of domestic legislation, the language of each directly aimed at bolstering China’s maritime claims. Since their passage, China has cited both international and these domestic Chinese laws when objecting to foreign vessel operations within the South China Sea.

In 1992, China adopted the Law on the Territorial Sea and the Contiguous Zone.<sup>178</sup> The majority of its text codifies into Chinese domestic law many of UNCLOS’s provisions relating to coastal State rights in territorial waters and the contiguous zone. Of specific importance is Article 2 of the law which begins by defining China’s

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 71.

<sup>177</sup> Zhirong, *supra* note 38, at 37–47. In addition to the arguments already stated, the Chinese delegation also asserted that the United States “denies the existence of the [EEZ]” by at times using the term “international waters,” that the EEZ is “free for navigation, overflight, and laying seabed cables” alone, and that the UNCLOS definition of “pollution of the marine environment . . . quite matches the operations mode of the *Impeccable*.”; PEDROZO, *supra* note 171, at 25–26. Pedrozo agrees that the semi-regular use of the term “international waters” by officials unnecessarily confuses the situation, but strongly disputes the inference that use of the term equals a denial of the existence of the EEZ.

<sup>178</sup> Law on the Territorial Sea and the Contiguous Zone (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 25, 1992, effective Feb. 25, 1992), *available at* [http://www.un.org/depts/los/legislationandtreaties/pdf/chn\\_1992\\_law.pdf](http://www.un.org/depts/los/legislationandtreaties/pdf/chn_1992_law.pdf) (last visited Sept. 26, 2013).

territorial sea as the “waters adjacent to its territorial land.”<sup>179</sup> The text goes on, however, to explicitly list the South China Sea islands and Diaoyu Island (claimed by Japan) as China’s territorial land.<sup>180</sup> Additionally, under Article 11 any foreign entity must “seek the consent” of China prior to engaging in “scientific research or marine survey.”<sup>181</sup>

The passage of the 1998 Law of the People’s Republic of China on the Exclusive Economic Zone and Continental Shelf builds upon its 1992 predecessor.<sup>182</sup> It, too, codifies many UNCLOS provisions, but as a companion to the 1992 Law on the Territorial Sea claims an EEZ extending from each of the South China Sea islands.<sup>183</sup> “Thus, in combination, these two Chinese laws assert an EEZ and therefore jurisdictional control over nearly the entire South China Sea area within the U-shaped line.”<sup>184</sup>

To say that China’s ability to project both naval and air power is greater than the other South China Sea nations is to grossly understate military reality. China understands this. Over the past twelve years, China has demonstrated a pattern of harassment of foreign military and commercial vessels operating in the South China Sea. Moreover, each incident is strikingly similar; China remains consistent in means, method, and manner as to the foreign targets it chooses to harass.

As noted above, demonstrating extended control or authority over a specific body of water or island is vitally important to claims of sovereignty under theories of historic title, CIL, and UNCLOS. Thus, it should not be surprising that the chosen tool for such demonstration is often militaristic. Yet, there is another aspect to the use of force to exercise control beyond the stated legal theories of ownership, one that is as old as history itself. Specifically, if a State possesses the power to solely control a territory, it effectively controls that territory regardless of legal realities.

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<sup>179</sup> *Id.* art. 2.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* art. 11.

<sup>182</sup> Exclusive Economic Zone and Continental Shelf Act (promulgated by the Standing Comm. Nat’l People’s Cong., June 26, 1998, effective June 26, 1998), *available at* [http://www.un.org/depts/los/legislationandtreaties/pdf/chn\\_1998\\_eez\\_act.pdf](http://www.un.org/depts/los/legislationandtreaties/pdf/chn_1998_eez_act.pdf) (last visited Sept. 26, 2013).

<sup>183</sup> *Id.*

<sup>184</sup> Peter Dutton, *Three Disputes and Three Objectives: China and the South China Sea*, 64 NAVAL WAR C. REV. 42, 50–51 (2011).



#### IV. The Sword: China's Military Enforcement Strategy

In recent years, China has escalated its willingness to utilize increasingly provocative and dangerous tactics in the air and at sea. As the following examples illustrate, China is waging a consistent campaign of harassing and interfering with the lawful navigation and operations of foreign military vessels sailing within China's uncontested EEZ (as measured from the mainland) and the disputed water banded by the U-shaped line.

##### A. Undesiring of the United States

While China's interference and harassment of foreign vessels is not solely targeted at the United States, few countries other than the United States, however, have the maritime resources to consistently challenge Chinese efforts to restrict lawful foreign operations within the South China Sea.

##### 1. EP-3 Aries Incident

As detailed in the introduction, the mid-air collision between the U.S. EP-3 Aries and the Chinese J-8 Finback created an extremely dangerous precedent. China's willingness to aggressively challenge long-standing and firmly established notions of legal flight operations in international airspace directly led to the loss of one its pilot's lives.<sup>185</sup> It nearly cost the United States the lives of twenty-four members of the U.S. Navy.<sup>186</sup> China's subsequent actions in refusing to grant permission for Lieutenant Osborne's beleaguered aircraft to land on the island of Hainan, refusing to release the aircrew for eleven days,<sup>187</sup> and refusing to

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<sup>185</sup> *Collision with China: Washington; Chinese Pilot Reveled in Risk, Pentagon Says*, NYTIMES.COM, <http://www.nytimes.com/2001/04/06/world/collision-with-china-washing-ton-chinese-pilot-reveled-in-risk-pentagon-says.html?pagewanted=all&src=pm> (visited Sept. 26, 2013).

<sup>186</sup> *Lt. Shane Osborn: Looking at a Miracle*, *supra* note 4, at 20–21.

<sup>187</sup> *See U.S. to Urge Beijing to Reign in Pilots*, CNN.COM, [http://articles.cnn.com/2001-04-16/us/uschina.jking\\_1\\_surveillance-flights-chinese-fighter-pilots-chinese-side?\\_s=PM:US](http://articles.cnn.com/2001-04-16/us/uschina.jking_1_surveillance-flights-chinese-fighter-pilots-chinese-side?_s=PM:US) (last visited Jan. 30, 2013) (on file with author); *see also China Calls for End to Surveillance Flights*, CNN.COM, [http://articles.cnn.com/2001-04-12/world/china.us-surveillance\\_1\\_ep-3-spy-plane-chinese-side?\\_s=PM:asiapcf](http://articles.cnn.com/2001-04-12/world/china.us-surveillance_1_ep-3-spy-plane-chinese-side?_s=PM:asiapcf) (last visited Jan. 30, 2013) (on file with author). Chinese foreign ministry spokeswoman, Zhang Qiyue, stated that

return or treat the downed aircraft as sovereign United States territory,<sup>188</sup> sparked a very tense series of exchanges between the two governments.<sup>189</sup> Unfortunately, as the following years would demonstrate, this incident would prove to be more rule than exception. While none of the subsequent incidents of harassment or interference have resulted in the loss of life, the disturbingly confrontational and often reckless manner in which China seeks to enforce its desire to restrict operations in certain waters makes a tragic outcome all the more likely.

## 2. *Harassment of the USNS Victorious*<sup>190</sup>

During the early months of 2009, China began to demonstrate an increased willingness to directly confront foreign vessels that it considered to be operating illegally within international waters, but within both its uncontested EEZ and the U-shaped line.<sup>191</sup> Although not occurring within the boundaries of the U-shaped line, Chinese harassment of the USNS *Victorious* (*Victorious*) proved to be demonstrative of its methods of operations and a harbinger for the nature of forthcoming events. The manner in which China conducted these engagements would also bear a chilling similarity to the behavior of its fighter jet pilots that led to the mid-air collision in 2001.

On March 4, 2009, the *Victorious* was conducting normal survey operations<sup>192</sup> in the Yellow Sea, approximately 125 miles off the coast of

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“[t]he U.S. should not make any wrong decisions or do anything which could complicate the matter further.”

<sup>188</sup> *U.S. Envoy Holds Brief Talks with China*, CNN.COM, [http://articles.cnn.com/2001-04-18/world/china.negotiations.05\\_1\\_chinese-officials-chinese-pilot-24-member-crew?\\_s=PM:asiapcf](http://articles.cnn.com/2001-04-18/world/china.negotiations.05_1_chinese-officials-chinese-pilot-24-member-crew?_s=PM:asiapcf) (last visited Jan. 30, 2013) (on file with author).

<sup>189</sup> *Id.*

<sup>190</sup> *Military Sealift Command Ship Inventory*, MSC.NAVY.MIL, <http://www.msc.navy.mil/inventory/ships.asp?ship=165&type=OceanSurveillanceShip> (last visited Sept. 26, 2013). The USNS *Victorious* is “one of the five Ocean Surveillance Ships that are part of the 25 ships in Military Sealift Command’s Special Mission Ships Program.” She is 235 feet long with a draft of 25 feet.

<sup>191</sup> *Pentagon Says Chinese Vessels Harassed U.S. Ship*, CNN.COM, <http://edition.cnn.com/2009/POLITICS/03/09/us.navy.china/index.html> (last visited Sept. 26, 2013).

<sup>192</sup> *Chinese Boats Harassed U.S. Ship, Officials Say*, CNN.ORG, <http://edition.cnn.com/2009/WORLD/asiapcf/05/05/china.maritime.harassment/index.html> (last visited Sept. 26, 2013). The USNS *Victorious*’ primary mission is to conduct underwater survey and acoustic listening operations in international waters.

China.<sup>193</sup> A Chinese Bureau of Fisheries Patrol vessel approached the *Victorious* in the dark.<sup>194</sup> It then illuminated the *Victorious* with a “high-intensity spotlight.”<sup>195</sup> The Patrol vessel then proceeded to cross the *Victorious*’ bow without warning “at a range of about 1,400 yards.”<sup>196</sup> The following day, a PRC aircraft overflew the ship twelve times.<sup>197</sup> The Chinese Y-12 aircraft, used primarily for maritime surveillance, flew over at an approximate altitude of 400 feet, coming within 500 yards of the *Victorious*.<sup>198</sup>

The Chinese harassment of the *Victorious* continued on May 1, 2009.<sup>199</sup> At the time of the confrontation, the *Victorious* was operating approximately one hundred and seventy miles off the Chinese mainland in the Yellow Sea.<sup>200</sup> Approached by two Chinese fishing vessels, the *Victorious* engaged in “defensive maneuvers” as the fishing vessels’ intentions were unknown.<sup>201</sup> The *Victorious* was forced to ready its fire hoses as the Chinese vessels continued to close the distance.<sup>202</sup> Operating in what the crew of the *Victorious* considered an unsafe manner, one of the Chinese vessels closed to within thirty yards.<sup>203</sup> The *Victorious* sounded her alarms and sprayed their fire hoses near the Chinese vessels, but did not directly target them.<sup>204</sup> At one point, the fishing vessels came to a full stop directly in the *Victorious*’ path. An incredibly dangerous maneuver during clear weather, the heavy fog present that day made the tactic even more so. In order to avoid a collision, the *Victorious* was forced to call for an emergency stop. The similarity of operation by the Chinese vessels and aircraft during this incident and that involving the USNS *Impeccable* in the South China Sea are difficult to ignore.

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<sup>193</sup> *Chinese Vessels Shadow, Harass Unarmed U.S. Survey Ship*, DEFENSE.GOV, <http://www.defense.gov/news/newsarticle.aspx?id=53401> (last visited Sept. 26, 2013).

<sup>194</sup> *Pentagon Says Chinese Vessels Harassed U.S. Ship*, *supra* note 191.

<sup>195</sup> *Chinese Vessels Shadow, Harass Unarmed U.S. Survey Ship*, *supra* note 193.

<sup>196</sup> *Chinese Boats Harassed U.S. Ship, Officials Say*, *supra* note 192.

<sup>197</sup> *Chinese Vessels Shadow, Harass Unarmed U.S. Survey Ship*, *supra* note 193.

<sup>198</sup> *Chinese Boats Harassed U.S. Ship, Officials Say*, *supra* note 192.

<sup>199</sup> *Chinese Vessels Approach Sealift Command Ship in Yellow Sea*, DEFENSE.GOV, <http://www.defense.gov/News/NewsArticle.aspx?ID=54196> (last visited Sept. 26, 2013).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Chinese Boats Harassed U.S. Ship, Officials Say*, *supra* note 192.

<sup>203</sup> *Chinese Vessels Approach Sealift Command Ship in Yellow Sea*, *supra* note 199.

<sup>204</sup> *Id.*

### 3. Harassment of the USNS *Impeccable*<sup>205</sup>

In early March 2009, a Chinese frigate closed to within 100 yards and crossed the bow of the USNS *Impeccable* (*Impeccable*).<sup>206</sup> A few hours later, a Chinese Y-12 aircraft performed “11 fly-bys of [the] *Impeccable* at an altitude of 600 feet and range of 100 to 300 feet.”<sup>207</sup> The Chinese frigate then followed the fly-bys by conducting a final crossing of the *Impeccable*'s bow at a slightly greater distance.<sup>208</sup> At no point during the encounter did the *Impeccable*'s crew receive any communications from either the Chinese vessel or aircraft denoting their intentions.<sup>209</sup>

Two days later, a Chinese intelligence collection ship contacted the *Impeccable*'s bridge via radio informing the USNS vessel that its “operations [were] illegal.”<sup>210</sup> The Chinese ship then directly threatened the *Impeccable* by directing it to leave the area or “suffer the consequences.”<sup>211</sup>

The most serious incident, however, occurred on March 8, 2009, when five Chinese vessels intercepted and engaged the *Impeccable* as she was conducting oceanic surveys in international waters in the South China Sea.<sup>212</sup>

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<sup>205</sup> *Military Sealift Command Ship Inventory*, MSC.NAVY.MIL, <http://www.msc.navy.mil/inventory/ships.asp?ship=106&type=OceanSurveillanceShip> (last visited Sept. 26, 2013). The “USNS *Impeccable* is one of the five Ocean Surveillance Ships that are part of the 25 ships in Military Sealift Command's Special Mission Ships Program.” It is 281.5 feet long with a draft of 26 feet. *Military Sealift Command Overview*, MSC.navy.mil, <http://www.msc.navy.mil/N00P/overview.asp> (last visited Jan. 30, 2012). USNS vessels operate differently than traditional U.S. Navy warships. The “Military Sealift Command reports through three distinct and separate chains of command: to U.S. Fleet Forces Command for Navy transport matters, and to U.S. Transportation Command for defense transportation matters,

<sup>206</sup> *U.S. Protests Harassing of Navy Ship by Chinese*, MSNBC.COM, [http://www.msnbc.msn.com/id/29596179/ns/world\\_news-asia\\_pacific/t/us-protests-harassing-navy-ship-chinese/#.T15RIHLQc\\_M](http://www.msnbc.msn.com/id/29596179/ns/world_news-asia_pacific/t/us-protests-harassing-navy-ship-chinese/#.T15RIHLQc_M) (last visited Sept. 26, 2013).

<sup>207</sup> *Pentagon Says Chinese Vessels Harassed U.S. Ship*, *supra* note 191.

<sup>208</sup> *U.S. Protests Harassing of Navy Ship by Chinese*, *supra* note 206.

<sup>209</sup> *Id.*

<sup>210</sup> *Chinese Vessels Shadow, Harass Unarmed U.S. Survey Ship*, *supra* note 193.

<sup>211</sup> *Id.*

<sup>212</sup> *Pentagon Says Chinese Vessels Harassed U.S. Ship*, *supra* note 191. “The Chinese ships involved were a Navy intelligence collection ship, a Bureau of Maritime Fisheries Patrol Vessel, a State Oceanographic Administration patrol vessel and two small Chinese-flagged trawlers.”

According to the Pentagon, two of the five Chinese vessels closed to within 50 feet of the *Impeccable*, waving Chinese flags and shouting for the USNS vessel to depart the area.<sup>213</sup> With the intentions of the Chinese vessels unknown, crew members aboard the *Impeccable* readied the ships external fire hoses and sprayed the harassing vessels' crewmembers.<sup>214</sup> The Chinese crewmembers disrobed and continued shouting as the vessels closed to within 25 feet of the *Impeccable*.<sup>215</sup>

After the *Impeccable's* crew announced over the loud speaker that it was seeking a safe route out of the area, two of the Chinese vessels maneuvered directly into the *Impeccable's* path forcing it to make an emergency stop to avoid a collision.<sup>216</sup> At one point, the Chinese vessels went so far as to drop debris into the *Impeccable's* path and attempt to grab the ship's deployed sonar array with long poles.<sup>217</sup>

The brazen and directly threatening nature of the *Impeccable's* encounters with PRC vessels and aircraft caused consternation within United States and Chinese diplomatic circles.<sup>218</sup> The U.S. Department of State lodged a formal protest with the China's Foreign Ministry through the U.S. Embassy in Beijing.<sup>219</sup> Similarly, the U.S. Department of Defense complained to the Chinese Embassy in Washington, D.C.<sup>220</sup> Maintaining its position that the *Impeccable* was conducting its mission in international waters, U.S. defense officials stated that the incident was "serious enough that we believe it requires face-to-face talks to find out what was going on here and to ensure that there are no further incidents of this nature in the future."<sup>221</sup> Reiterating the U.S. position that the *Impeccable* was conducting lawful operations well within international water boundaries, Pentagon Press Secretary Geoff Morrell said on March

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Discussions Aim to Resolve U.S. Survey Ship Incident*, DEFENSE.GOV, <http://www.defense.gov/news/newsarticle.aspx?id=53438> (last visited Sept. 26, 2013). *See also Chinese Vessels Shadow, Harass Unarmed U.S. Survey Ship*, DEFENSE.GOV, <http://www.defense.gov/news/newsarticle.aspx?id=53401> (last visited Sept. 26, 2013). Defense officials stating, "We expect Chinese ships to act responsibly and refrain from provocative activities that could lead to miscalculation or a collision at sea, endangering vessels and the lives of U.S. and Chinese mariners."

11, 2009 that the United States “hope[s] that the Chinese would behave in a similar way, that is, according to international law.”<sup>222</sup> Furthermore, this incident is not at all consistent with the expressed desire of both governments to build a closer relationship, particularly a closer military-to-military relationship.”<sup>223</sup> Morrell further stated that due to the *Impeccable*'s lawful conduct and position, there was no “reason to interfere with those operations.”<sup>224</sup> These incidents showcased the Chinese intention to use its military and quasi-civilian vessels and aircraft to intercept, interfere, and threaten foreign maritime traffic in the South China Sea.

To underscore the seriousness of these incidents, the U.S. Chief of Naval Operations, Admiral Gary Roughead visited China in May 2009 to discuss the “safety of U.S. and Chinese maritime operations.”<sup>225</sup> Following the *Impeccable* and *Victorious* incidents, the U.S. Navy began to assign various warships to serve as escorts for some USNS missions.<sup>226</sup> Yet, China is not directing its efforts solely at the United States; its geographic neighbors are targets as well.

#### B. Interdicting India

From mid to late July, 2011, the Indian Navy Ship (INS) *Airavat* paid a series of port calls to the Vietnamese port of Nha Trang.<sup>227</sup> The port is located on Vietnam's south central coast.<sup>228</sup> On July 22, 2011, the INS *Airavat* departed Nha Trang en-route to Haiphong, another Vietnamese port. When the Indian ship was approximately forty-five miles from the Vietnamese coast, in international waters within the South China Sea, an unsolicited call came in over the bridge's open radio channel.<sup>229</sup> Identifying itself as the Chinese Navy, the voice ordered the

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<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Chinese Boats Harassed U.S. Ship, Officials Say, supra* note 192.

<sup>226</sup> *Id.*

<sup>227</sup> *China Harasses Indian Naval Ship on South China Sea*, TIMESOF INDIA.COM, [http://articles.timesofindia.indiatimes.com/2011-09-02/india/30105514\\_1\\_south-china-sea-spratlly-ins-airavat](http://articles.timesofindia.indiatimes.com/2011-09-02/india/30105514_1_south-china-sea-spratlly-ins-airavat) (last visited Sept. 26, 2013).

<sup>228</sup> Nha Trang is a major military port that was primarily established by the United States during the Vietnam Conflict.

<sup>229</sup> *India, China Navies Face-Off*, THE-DIPLOMAT.COM, <http://the-diplomat.com/indian-decade/2011/09/01/india-china-navies-face-off/> (last visited Sept. 26, 2013).

INS *Airavat* to identify itself.<sup>230</sup> When the INS *Airavat* failed to respond, the caller informed the Indian ship that it was “entering Chinese waters” and instructed the ship to “move out of here.”<sup>231</sup> The INS *Airavat* could not locate another vessel on its radar nor was any other ship visible on the horizon, thus it continued on its original course toward Haiphong.<sup>232</sup>

At the time, the Indian government downplayed the incident and did not file a formal diplomatic protest with China.<sup>233</sup> It did, however, describe the event as very unusual and reiterated its position that “India supports freedom of navigation in international waters, including in the South China Sea, and the right of passage in accordance with accepted principles of international law.”<sup>234</sup> Per the Times of India, almost exactly one month later, China expressed its displeasure with the Indian Navy’s visit to Vietnam through a statement issued by its official news agency.<sup>235</sup>

### C. Rebuking the Republic of Vietnam

China and Vietnam have a contentious history regarding competing maritime and territorial claims in the South China Sea. The geographic fact that China and Vietnam share overlapping EEZs is a significant contributing factor to this tension. China and Vietnam came to blows in 1974 over the Paracel Islands. China gained control of the islands following a fairly one-sided naval battle in which they defeated Vietnamese forces. Fifteen years later in 1989, the two nations fought a brief naval battle over near the Spratly Islands. There is some consensus

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<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *China Harasses Indian Naval Ship on South China Sea*, *supra* note 227.

<sup>233</sup> *India, China Navies Face-Off*, *supra* note 229.

<sup>234</sup> *Id.*

<sup>235</sup> *China Harasses Indian Naval Ship on South China Sea*, *supra* note 227.

China has in the past month expressed serious displeasure about India's growing ties with Vietnam. On August 18, the official Chinese news agency Xinhua analyzed the India-Vietnam relationship, saying it would create ‘challenges’ for China. It highlighted the Indian Navy's goodwill visit to Vietnam, saying, ‘It is a clear indication that Vietnam is attempting to include a third country in the South Sea dispute.’

*Id.*

that of all of the disputes that China has with other nations regarding economic, military, and other forms of activity within the South China Sea, its confrontations with Vietnam constitute the greatest possibility for true military escalation.

The most recent crisis point occurred in late May and early June 2010. On May 29, 2011, Vietnam's state-owned oil and energy company, PetroVietnam, accused China of purposefully sabotaging its operations.<sup>236</sup> Vietnamese officials alleged that on May 26, 2011, three Chinese patrol vessels approached a PetroVietnam ship at high speed.<sup>237</sup> About an hour prior to the approach, the Vietnamese ship detected the patrol vessels on radar, but the Chinese vessels never communicated a warning or any announcement of their approach.<sup>238</sup> (The PetroVietnam ship, the Binh Minh 02, was conducting seismic surveys where "[t]he encounter took place 120 nautical miles off the coast of Phu Yen province in south-central Vietnam, in waters that are claimed by both China and Vietnam.")<sup>239</sup> The Binh Minh 02 transmitted warnings to the approaching vessels, but they were not acknowledged.<sup>240</sup> At a distance of approximately two kilometers from the Binh Minh 02, one of the Chinese vessels veered off from the group and intercepted the oil exploration vessel's undersea survey cable.<sup>241</sup> The Chinese patrol vessel cut the cable which had been submerged at a depth of 30 meters to avoid crossing ship traffic.<sup>242</sup>

Less than two weeks later, a strikingly similar incident would occur between another of PetroVietnam's survey ships and a Chinese fishing vessel. On June 9, 2011, a Chinese fishing vessel rammed the Vietnamese vessel's seismic survey cables while it conducted an operation similar to that attempted by the Binh Minh 02.<sup>243</sup> At the time

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<sup>236</sup> *Vietnam and China Oil Clashes Intensify*, FT.COM, <http://www.ft.com/intl/cms/s/0/4d3badc0-8867-11e0-a1c3-00144feabdc0.html#axzz1kfwIfNLx> (last visited Sept. 26, 2013).

<sup>237</sup> *Vietnam Accuses China in Seas Dispute*, BBC.CO.UK, <http://www.bbc.co.uk/news/world-asia-pacific-13592508> (last visited Sept. 26, 2013).

<sup>238</sup> *Vietnam and China Oil Clashes Intensify*, *supra* note 236.

<sup>239</sup> *Id.*

<sup>240</sup> *Vietnam Accuses China in Seas Dispute*, *supra* note 237.

<sup>241</sup> *Id.*

<sup>242</sup> *Vietnam and China Oil Clashes Intensify*, *supra* note 236.

<sup>243</sup> *Vietnam Says Chinese Boat Harassed Survey Ship; China Disputes*, BUSINESSWEEK.COM, <http://www.businessweek.com/news/2011-06-09/vietnam-says-chinese-boat-harassed-survey-ship-china-disputes.html> (last visited Sept. 26, 2013).



of the collision, the Vietnamese ship was located more than six hundred and twenty two miles from the island of Hainan.<sup>244</sup>

The public response from China's state news agency, Xinhua News, was intriguing. It reported that China's Foreign Ministry demanded that Vietnam "halt all acts which violate Chinese sovereignty over the Nansha Islands and the surrounding waters."<sup>245</sup> It described an incident in which armed Vietnamese vessels "chased away" Chinese fishing boats.<sup>246</sup> Differing significantly from the Vietnamese version, Chinese Foreign Ministry spokesman, Hong Lei, claimed that as the Vietnamese chased the Chinese fishing boats out of the area, one of the fishing boats' nets became "tangled with the cables of [a] Vietnamese oil exploring vessel, which was operating illegally in the same water area."<sup>247</sup> This entanglement led to the fishing boats being forcibly dragged, stern forward, for over an hour. Eventually, the crew of the fishing boat was forced to cut their nets away to separate the two vessels.<sup>248</sup>

Although the accuracy regarding the reporting of the facts may be disputed, the specific language used by China's official state news agency in addressing the situation is more important. The Chinese foreign ministry described its sovereignty over the Nansha (Spratly) Islands and surrounding waters as "indisputable."<sup>249</sup> Further, it stated that such sovereignty has been evident "from generation to generation."<sup>250</sup> Chinese officials referred to Vietnam's "exploration on the Vanguard Bank and chasing away of the Chinese boats" as having "grossly infringed the Chinese sovereignty and maritime rights."<sup>251</sup> Another translation uses the word "gravely" instead of "grossly."<sup>252</sup>

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<sup>244</sup> *Id.*

<sup>245</sup> *Vietnam Urged to Halt Acts Violating Chinese Sovereignty over Nansha Islands and Surrounding Waters*, XINHUANET.COM, [http://news.xinhuanet.com/english2010/china/2011-06/10/c\\_13920791.htm](http://news.xinhuanet.com/english2010/china/2011-06/10/c_13920791.htm) (last visited Sept. 26, 2013).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Vietnam Says Chinese Boat Harassed Survey Ship; China Disputes*, *supra* note 243.

<sup>251</sup> *Vietnam Urged to Halt Acts Violating Chinese Sovereignty over Nansha Islands and Surrounding Waters*, *supra* note 245.

<sup>252</sup> *China Accuses Vietnam in South China Sea Row*, BBC.CO.UK, <http://www.bbc.co.uk/news/world-asia-pacific-13723443> (last visited Sept. 26, 2013). Diplomatic circles are careful to use either word as doing so is often interpreted as drawing a line in the diplomatic sand.

Diplomatic circles are careful to use either word as doing so is often interpreted as drawing a line in the diplomatic sand.

In response, Nguyen Phuong Nga, the Vietnamese foreign ministry spokeswoman, stated that the Vietnamese survey ship was operating within Vietnam's EEZ.<sup>253</sup> She referred to the incident as "premeditated and carefully calculated"<sup>254</sup> and stated that "[t]hese acts are tailored in a very systematic way by the Chinese side with the aim to turn undisputed areas into disputed areas."<sup>255</sup> Indeed, when comparing the Chinese conduct alleged by the various nations, a similar pattern is evident.

#### D. Jousting with Japan

Demonstrative of its strategy to harass foreign vessels with a combination of state-sponsored boats and aircraft, China's strategy remains consistent in any area where it deems it possesses a water, land, or air sovereignty claim. Similar to Vietnam, Japan shares a contentious history with China, but for different historical reasons altogether. While the two nations have fought various conflicts against one another throughout history, significant land and sea disputes linger as a result of their most recent and bloodiest conflict, World War II.

The Senkaku Islands lie approximately 240 miles southwest of Okinawa. China refers to them as the Diaoyu Islands.<sup>256</sup> Although they lie outside of the U-shaped line, they are the subject of a long-term and tense ownership dispute between China and Japan. Consequently, the Senkaku Islands are demonstrative of China's consistent maritime harassment practice in asserting territorial and water-based sovereignty.

On September 7, 2010, a Chinese fishing trawler collided with one of two Japanese patrol boats just off the Senkaku Islands.<sup>257</sup> In a video leaked to the internet, one can view the Chinese vessel approach the

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<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Vietnam Says Chinese Boat Harassed Survey Ship; China Disputes*, *supra* note 243.

<sup>256</sup> *China Demands Compensation over Captured Sailor*, ABC.NET.AU, <http://www.abc.net.au/news/2010-09-26/china-demands-compensation-over-captured-sailor/2274458> (last visited Sept. 26, 2013).

<sup>257</sup> *Id.*

patrol boats and bump up against them two times.<sup>258</sup> The Japanese coast guard cutters issued repeated warnings in both Japanese and Chinese prior to the collision, but the fishing vessel did not alter course.<sup>259</sup>

Tensions between the two States escalated dramatically when the Japanese detained the fishing vessel's captain and crew.<sup>260</sup> Japanese authorities released the Chinese crew on September 13, 2010, but the captain remained in detention until September 25, 2010.<sup>261</sup> The Chinese foreign ministry repeatedly demanded that Japan return the trawler's captain during his incarceration. The foreign ministry stated that the captain's detention was illegal as it "seriously infringed upon China's territorial sovereignty and violated the human rights of Chinese citizens."<sup>262</sup> The ship captain personally reiterated the Chinese government's position upon his return to Fuzhou, China, saying, "I am thankful to the party, the government and my fellow citizens for my peaceful return. My detention by Japan was illegal. The Diaoyu Islands are part of Chinese territory. I firmly support the Chinese government's position."<sup>263</sup>

The repercussions from the incident continued well past the repatriation of the Chinese fishing vessel's captain and crew. While the Chinese government denied it, several Japanese companies reported a halt to shipments from China.<sup>264</sup> Some blamed Chinese customs while others stated that their contracts had been cancelled outright by Chinese exporters.<sup>265</sup>

## V. Conclusion

China's strategy to control the lands and waters within the U-shaped line fully recognizes the temporal component necessary to the establishment of any authoritative international law. China understands

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<sup>258</sup> *Senkaku Collisions Video Leak Riles China*, JAPANTIMES.COM, [www.japantimes.co.jp/text/nn20101106a1.html](http://www.japantimes.co.jp/text/nn20101106a1.html) (last visited Mar. 2, 2012)

<sup>259</sup> *Id.*

<sup>260</sup> *China Demands Compensation over Captured Sailor*, *supra* note 256.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *China Rare Earth Exports to Japan Still Halted*, BUSINESSWEEK.COM, <http://www.businessweek.com/ap/financialnews/D9J02PF01.htm> (last visited Sept. 26, 2013).

<sup>265</sup> *Id.*

that legal authority within international law is gained by taking the long view. It is a strategy comprised of gaining several small toe-holds rather than one or two major efforts. Each toe-hold represents a small area of control, either in the physical or legal realm.

Basing the foundation of its legal argument for sovereignty over the South China Sea islands and waters in the past is an essential maneuver. The primary problem for China in maintaining this argument is asserting that it has maintained control over the area in question for a period of time significant enough to establish a historic claim under international law.<sup>266</sup>

For example, the number of instances that nations such as France, Japan, and Vietnam can credibly claim to have controlled, in either full or partial measure, some or all of the islands within the South China Sea is a serious impediment to China's historical argument. The required criteria, that possession must be both clear and effective over a substantial period of time, is difficult for China to meet. The Chinese government knows this, thus it seeks to build a step-ladder to legal legitimacy by creating the evidence it needs over the period of time it requires.

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<sup>266</sup> *Alarm as China Issues Rules for Disputed Area*. THE NEW YORK TIMES.COM, <http://www.nytimes.com/2012/12/02/world/asia/alarm-as-china-issues-rules-for-disputed-sea.html> (last visited June 5, 2013). "New rules announced by a Chinese province last week to allow interceptions of ships in the South China Sea are raising concerns in the region, and in Washington, that simmering disputes with Southeast Asian countries over the waters will escalate." These rules, passed as part of a domestic law effort, signify an overt attempt by China to bolster its historic claim by creating a consistent internal position. In essence, at some point in the future it may argue that it controls, thus is sovereign, over the area because it has always acted as if it did. It is a simple, yet clever, argument as it actively accepts the long view required under international law. See *Q&A South China Sea Dispute*. BBC.CO.UK. <http://www.bbc.co.uk/news/world-asia-pacific-13748349> (last visited May 5, 2013).

In July 2012 China formally created Sansha city, an administrative body with its headquarters in the Paracels which it says oversees Chinese territory in the South China Sea - including the Paracels and the Spratlys. Both Vietnam and the Philippines protested against this move. In November 2012, China granted its border patrol police in Hainan the power to board and search foreign ships stopping in its waters or violating other regulations.

*Id.*

Attempts to redefine specific wording found in UNCLOS and the passage of targeted domestic legislation are part of this effort. The surveillance missions undertaken by the USNS *Victorious* and USNS *Impeccable* would be considered unlawful under UNCLOS. Even though the United States has not ratified UNCLOS, the weight that UNCLOS holds as customary international law would create significant limitations for U.S. Navy operations within the South China Sea were China's interpretations of the treaty to gain legal traction. Yet, acceptance of this position through a widespread portion of the international community is highly unlikely in the near term. Still, the effects of acceptance would not be limited to the United States. Vietnam, India, Malaysia, and other South China Sea States would be formally precluded from conducting similar activity within China's EEZ as they are all UNCLOS signatories.

China's employment of military or military-type enforcement in the South China Sea is both the most basic and most dangerous aspect of its strategy. The rationale behind it is simple. If China can deny the use of specific areas to the otherwise lawful transit or operation of foreign vessels, it gains an element of control. Additionally, using quasi-official fishing vessels as enforcement tools alongside military vessels provides the Chinese government with some level of plausible deniability, though the pattern of behavior is easily ascribable to the Chinese government given the specific marine and aeronautical assets involved. Yet, despite all of the significant obstacles inherent to each aspect of its effort, China's strategy is slowly proving effective.

The effectiveness of the strategy has more to do with the military and economic resources of the State employing the strategy than the legal merits of the strategy itself. The scope of China's military, economic, and political capabilities demand that other States, especially regional neighbors, pay close attention to what China says and does. This is evident in the manner in which other States have responded or reacted to China's strategic tactics in expressing its extraordinary maritime claims in the South China Sea.

For example, following the incident with the *Impeccable* in 2009, the U.S. Navy directed the USS *Chung Hoon*, a guided-missile destroyer, to accompany the *Impeccable* when it returned to the South China Sea several days later.<sup>267</sup> The addition of a warship to escort the *Impeccable*

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<sup>267</sup> Dutton, *supra* note 184, at 54.

signifies an expenditure of personnel and resources that would otherwise be tasked elsewhere. Mission planning decisions regarding resources allocated to survey missions in the South China Sea must now factor in the possibility of Chinese harassment and how to compensate for it.

Furthermore, the extent to which the Chinese strategy is showing signs of effectiveness is evident by the level of political discussion dedicated to the subject. In 2000, the U.S. Congress created the United States-China Economic and Security Review Commission (Commission) to “review the national security implications of trade and economic ties between the United States and the People's Republic of China.”<sup>268</sup> Part of its mandate is to conduct hearings to collect information and to submit an annual report to the U.S. Congress on major issues of concern between the United States and China. In 2011, the Commission heard extensive testimony related to China's strategy in the South China Sea.<sup>269</sup> Such high-level governmental discussions are not limited to the United States.

In the latter half of 2011, Japan held formal talks with the Philippines to discuss the establishment of a “permanent working group” to address issues of “disputes and other Asian maritime concerns.”<sup>270</sup> Likewise, Japan and India have recently sought to strengthen their political and economic ties. The two States signed two formal agreements in 2010:

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<sup>268</sup> 22 U.S.C. § 7002 (2006).

<sup>269</sup> *China's Active Defense Strategy and its Regional Impact: Hearing Before the U.S.-China Economic and Security Review Comm'n Before the H. Comm. on the Armed Services*, 112th Cong. 9 (2011) (statements of Lieutenant General David A. Deptula, U.S. Air Force (Retired), Captain Stacy A. Pedrozo, Judge Advocate General's Corps, U.S. Navy).

<sup>270</sup> *Japan Wades into South China Sea Feud*, JAPANTIMES.CO.JP, <http://www.japantimes.co.jp/text/nn20110922a7.html> (last visited Sept. 26, 2013). “Japanese Ambassador to the Philippines Toshinao Urabe said Tuesday that Tokyo has an interest in ensuring that the vast ocean remains safe and open to commerce. Japanese officials will ‘exchange notes’ with their Philippine counterparts and assess how they can help ensure that the disputes are resolved peacefully, he said.” Additionally,

‘[w]e want a peaceful solution under the international framework, Urabe said. “It is very clear that a lot of traffic goes through that area.’ . . . Urabe said any discussion between the two countries about the South China Sea does not mean they are ganging up on Beijing, which is ‘a very important partner for both of us.’ ‘We are not having an alliance against China, Urabe [also] said. ‘The objective is to create a win-win relationship among us.’

the Joint Statement Vision for Japan-India Strategic and Global Partnership in the Next Decade and a Comprehensive Economic Partnership Agreement.

India, for its part, is similarly situated to Japan as a non-South China Sea State with significant economic interests in seeing commercial shipping lanes in the South China Sea remain unimpeded. In late 2011, India likewise engaged a South China Sea State, Vietnam, in diplomatic talks. “Vietnamese President Truong Tan Sang met Indian Prime Minister Manmohan Singh in New Delhi, with both sides pledging to maintain peace and security in the South China Sea while expanding the contents of their strategic partnership.”<sup>271</sup> The political subtext underlying the political engagement of these four States is concern over China’s South China Sea claims.

China’s strategy is causing other nations to react; it is changing, perhaps even directing, the political conversation among States with an interest in the South China Sea, whether that interest is economic or strategic. And, while no State will concede that China has sovereign rights over the islands and waters located within the U-shaped line, China’s strategy is beginning to pay off, in small, but tangible ways. The United States and China’s neighboring countries have had to allocate greater resources in assets, personnel, and money to combat China’s efforts. The assignment of armed escorts to vessels conducting operations, asserted as legal per the vessel’s flag State, on the high seas and within foreign EEZs is one example. The formation of high-level government commissions and formal bilateral State agreements are another. Only ineffective strategies may be ignored.

The concern over China’s effort to gain sovereignty over the South China Sea has less to do with the specific State behind the effort than with the consequences of any one State possessing hegemonic ownership of the South China Sea. It is China’s military and economic resources rather than any particular political or social philosophy that make this a significant concern for other interested States. The fact that South China Sea is the proverbial tinderbox with the potential for a small or minor incident to swiftly ignite into an international crisis only intensifies the concern. China’s efforts to gain sovereign control over the islands and

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<sup>271</sup> *India and Japan’s Involvement in the South China Sea Disputes*, EASTASIAFORUM.ORG, <http://www.eastasiaforum.org/2011/11/10/india-and-japan-s-involvement-in-the-south-china-sea-disputes/> (last visited Sept. 26, 2013).

waters within the South China Sea constitute a grave threat to regional peace and security, as would the efforts of any other single State.

The potentiality for this effort to result in the loss of life is proven.<sup>272</sup> Small scale skirmishes have the potential to re-occur and ignite into larger conflicts. It does not take much imagination for another similar incident to take place given the hazardous and unsafe practices exhibited by China in confronting those it considers to be violating its claimed sovereignty. In order to prevent a future maritime incident from growing into a larger diplomatic, or even armed conflict, some scholars argue for a setting aside of the debates over sovereignty or ownership in favor of a focus on establishing formal safety guidelines.<sup>273</sup> Perhaps this is the answer in the short term, at least in regard to preventing further casualties at sea. Yet, even if China ceases its overt military enforcement tactics, China is unlikely to deviate from its core goal of obtaining sovereignty over the South China Sea islands and waters. If successful, China will have achieved through the use of lawfare what it traditionally would have had to achieve almost solely through military force.

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<sup>272</sup> *U.S. Spy Plane, Chinese Fighter Collide*, *supra* note 30.

<sup>273</sup> *US and China Can't Calm South China Sea*, ASIATIMES.COM, <http://www.atimes.com/atimes/China/LF04Ad01.html> (last visited Sept. 26, 2013). Raul Pedrozo, a retired U.S. Navy Judge Advocate General's Corps Captain and Associate Professor of International Law at the U.S. Naval War College argues that

[i]t is time for the 'legal' debate to be put on the shelf, at least in the short term." Referring to Military Maritime Consultative Agreement signed by China and the US in 1998, Pedrozo states that effort should "focus on . . . developing operational safety measures and procedures that limit mutual interference and uncertainty and facilitate communication when US and PLA military ships and aircraft make contact at sea.

*Id.*